

IN THE ARBITRATION UNDER THE TREATY BETWEEN
THE UNITED STATES OF AMERICA AND THE REPUBLIC OF ECUADOR
CONCERNING THE ENCOURAGEMENT AND RECIPROCAL PROTECTION OF INVESTMENTS
AND THE UNCITRAL ARBITRATION RULES (1976)
BETWEEN

THE REPUBLIC OF ECUADOR,

Claimant/Party,

-and-

THE UNITED STATES OF AMERICA,

Respondent/Party.

PCA CASE NO. 2012-5

COUNTER-MEMORIAL OF CLAIMANT REPUBLIC OF ECUADOR ON JURISDICTION

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I. INTRODUCTION

1. Ecuador has commenced this proceeding under the State-to-State arbitration provisions of Article VII of the Treaty between the United States of America and the Republic of Ecuador concerning the Encouragement and Reciprocal Protection of Investment (“Treaty”) because there is a “dispute between the Parties concerning the interpretation or application of the Treaty which [has not been] resolved through consultations or other diplomatic channels.”¹ The dispute concerns the proper interpretation and application of Article II(7) of the Treaty, which requires that “[e]ach Party shall provide effective means of asserting claims and enforcing rights with respect to investment, investment agreements, and investment authorizations.”²

2. The United States denies that this Tribunal has jurisdiction in this case on a number of grounds. In logical sequence, the United States’ first argument is that, even if there were an interpretation/application dispute, Article VII jurisdiction can be exercised only when such a dispute arises in “a concrete case involving a claim of breach under the Treaty.”³ The United States’ second argument is that no interpretive dispute exists in any event.

3. Neither of these arguments withstands scrutiny. The United States’ first position would read into what is otherwise straight-forward and clear language terms of limitation that simply do not exist. Moreover, the United States’ insistence that such limitations have been consistently honored flies in the face of abundant authority, including decisions in cases where the United

¹ Ecuador and the United States concluded the Treaty on 27 Aug. 1993. The Treaty came into force on 11 May 1997.

² Ecuador-U.S. BIT, Article II(7)

³ United States’ Memorial on Jurisdiction (25 Apr. 2012), p. 17. (“Memorial on Jurisdiction”).

States was itself a party; in light of this fact, its pretension that it has found only one case on point is quite inexplicable.

4. The United States second position is as misplaced as it is convenient for the United States to take. No doubt the United States prefers not to have to go on record with an interpretation adverse to one secured by one of its nationals in a previous investor-State arbitration, even if it agrees with that interpretation. But the United States may not thereby unilaterally deny to Ecuador the benefit of the rights it enjoys under Article VII to clarify the Parties' obligations under Article II(7) of the Treaty. The circumstances in which Ecuador finds itself – suffering loss due to an erroneous and unprecedented interpretation by an investor-State tribunal, at a loss regarding what it must do to be in compliance with its treaty obligations, and wishing quite reasonably to avoid future erroneous holdings of liability – all of which have been conveyed to the United States, are circumstances that, under the applicable principles of international law, thereupon called for a response from the United States. The absence of that response establishes under those same international law principles that a dispute exists regarding the interpretation and application of the Treaty.

5. In addition to these two principal positions, the United States also raises a plethora of arguments intended to divert the Tribunal from the core issues relevant to its jurisdiction. None of these extraneous considerations, primarily based upon mischaracterizations of the proceedings, affects the Tribunal's jurisdiction in this case.

6. This Counter-Memorial demonstrates that the Tribunal unquestionably has jurisdiction over Ecuador's claim regarding the interpretation of Article II(7) of the Treaty. It begins with an explanation of the background of the claim and the factual circumstances – uncontested at this

stage by the United States, but nevertheless corroborated by the Statement of former Ecuadorian ambassador to the United States, his Excellency Luis Benigno Gallegos – that determines that a justiciable dispute exists. It then proceeds to address each of the three sets of arguments described above, demonstrating that, under the overwhelming weight of applicable legal authority, this Tribunal may properly exercise the jurisdiction afforded to it by Article VII to render a definitive decision on the interpretation and application of Article II(7).

7. In support of this demonstration, Ecuador submits herewith the opinions of three eminent experts who agree, and explain why, there is jurisdiction under Article VII in this case. They are:

Professor Alain Pellet, Professor of International Law at the University Paris Ouest, Nanterre-La Défence and the former Chairman of the International Law Commission;

Professor Stephen McCaffrey, Distinguished Professor and Scholar at the University of the Pacific, former member and Chairman of the International Law Commission and Counselor on International Law in the Office of the Legal Advisor at the United States Department of State; and

Professor C.F. Amerasinghe, the author of leading works on the jurisdiction of international courts and tribunals, including *Jurisdiction of International Tribunals* (2002).

All three distinguished experts agree that the Tribunal has jurisdiction to arbitrate Ecuador's dispute with the United States regarding Article II(7).

8. Finally, Ecuador concludes by requesting that the Tribunal exercise its authority, and perform its duty, by proceeding to the merits of the claim.

II. FACTUAL AND PROCEDURAL HISTORY

9. The issues of interpretation and application that have resulted in this dispute first emerged as a result of an investor-state arbitration commenced by Chevron Corp. and Texaco

Petroleum Co. under Article VI of the Treaty (“*Chevron*”). In that proceeding, the plaintiff raised substantive claims, under various provisions of the Treaty, based on what they considered to be undue delays in resolving seven commercial cases pending before Ecuadorian courts. The principal basis of these claims was the assertion that, by virtue of these delays in the Ecuadorian courts, Ecuador had committed a denial of justice under customary international law covered by Article II(3)(a) of the Treaty.⁴ But another basis, and one that was only minimally argued by the parties, was that the courts’ delays breached Article II(7).

10. In its Partial Award of 30 March 2010, the *Chevron* tribunal did not rule that Ecuador had breached any obligation under customary international law, and in particular, made no finding that Ecuador had committed a denial of justice. However, contrary to Ecuador’s understanding of what had been the common intentions of the United States and Ecuador in concluding the Treaty, the tribunal found that Article II(7) constituted *lex specialis* and imposed obligations on the Contracting Parties beyond those required by customary international law.

11. Ecuador accepts that the Partial Award in *Chevron* is final and binding, as required by Article VI(6), subject only to its right to challenge the award under the procedures available to it under the laws of the seat of the arbitration (the Netherlands). It does not seek here to affect, let alone appeal, set aside or nullify that award, and it understands that the Tribunal’s award in this case will have no impact on the legal effect of the *Chevron* award, whose status is entirely in the hands of the Dutch courts.

⁴ Ecuador-U.S. BIT, Article II(3)(a) (“Investment shall at all times be accorded fair and equitable treatment, shall enjoy full protection and security and shall in no case be accorded treatment less than that required by international law.”)>

12. Nevertheless, the *Chevron* tribunal’s unexpected ruling has given rise to considerable uncertainty regarding the meaning of Article II(7), and the scope of Ecuador’s obligations thereunder, in particular whether Ecuador is now obligated to take additional steps (and if so, what they might be) in order to satisfy the requirements of that Article. The erroneous interpretation of Article II(7) by the *Chevron* tribunal is also of grave concern, not only because of the compensation that Ecuador has been ordered to pay in that case, but because of the potential of future liability based upon Article II(7).

13. To remove this uncertainty, Ecuador sought to confirm that the United States shared what Ecuador had always understood to be a mutually held view: that Article II(7) reflects customary international law standards and does not create a *lex specialis*, that it expresses a component of the principles relating to denial of justice and that it requires in its application deference to municipal court determinations of the content and applicability of municipal law. Accordingly, by Note dated June 11, 2010, Ecuador’s Embassy to the United States transmitted to the U.S. Department of State a letter dated June 8, 2010 from Ecuador’s Minister of Foreign Affairs, Trade and Integration, Ricardo Patiño Aroca, to U.S. Secretary of State Hillary Clinton. In this letter, Ecuador explained that “serious issues [] have arisen concerning the proper interpretation and application to be accorded to terms of the Treaty” as a result of the *Chevron* Partial Award,⁵ and emphasizing that the Partial Award’s interpretation of Article II(7) had “put into question the common intent of the Parties with respect to the nature of their mutual obligations.”⁶

⁵ Diplomatic Note No. 13528-GM/2010 from the Government of the Republic of Ecuador to the Government of the United States of America (delivered by Note No. 4-2-87/10 on June 11, 2010) (Annex B to RfA).

⁶ *Id.*, p. 1.

14. Ecuador raised three matters of interpretation that it sought to clarify with the United States. Specifically, Ecuador asked the United States to confirm that it shared Ecuador's view that:

- A. the obligations of the Parties under Article II(7) are not greater than their obligations under pre-existing customary international law;
- B. the Parties' obligations under Article II(7) require only that the Parties provide a framework or system under which claims may be asserted and rights enforced, but do not obligate the Parties to assure that the framework or system provided is effective in individual cases; and
- C. Article II(7) may not be properly applied in a manner under which the fixing of compensation due for a violation of the provision is based upon determinations of rights under the respective law of the United States or Ecuador that are contrary to actual or likely determinations made by United States or Ecuadorian courts.⁷

15. To underscore the importance for Ecuador of clarifying the interpretation of Article II(7), its Ambassador to the United States, Mr. Luis Benigno Gallegos, requested to meet with the Legal Advisor to the United States Department of State, Mr. Harold Koh. Ecuador's request was accepted, and Ambassador Gallegos and Mr. Koh, accompanied by their respective staffs and advisors, met on June 17, 2010 at the U.S. Department of State. At the meeting, Ecuador explained its views on the three matters of interpretation raised therein and sought the United States' views.

16. In response, Mr. Koh stated that the United States would study Ecuador's views and initiate its inter-agency process for determining its own position.

17. On August 23, 2010, Ecuador received a formal acknowledgement of its Note from Mr. Arturo Valenzuela, the United States Assistant Secretary of State for Western Hemisphere

⁷ The Republic of Ecuador's Request for Arbitration, 28 June 2011, ¶ 15.

Affairs.⁸ Consistent with Mr. Koh's statements regarding the U.S. engaging its inter-agency process, Assistant Secretary Valenzuela's letter stated that "the U.S. government is currently reviewing the views expressed in your letter and considering the concerns you have raised." The Note further stated that the United States "look[s] forward to remaining in contact about this and other important issues that affect our two nations." In light of the statements made by Mr. Koh on June 17, 2010 and Assistant Secretary Valenzuela on August 23, 2010, Ecuador expected that the United States would provide its interpretation of Article II(7), and would then engage in bilateral dialogue with Ecuador in the event that its interpretation differed from that of Ecuador.

18. However, Ecuador's expectations were disappointed: its request for an interpretation of Article II(7) was met with silence. Undeterred, Ecuador made additional attempts to engage the United States in discussions regarding Article II(7). The Ecuadorian Embassy in Washington made multiple attempts to call Mr. Koh in order to follow up on its request for the United States to provide its interpretation of Article II(7).⁹

19. These messages went unreturned until October 4, 2010, nearly four months after Ecuador had first raised the matter with the United States. On that day, Mr. Koh placed a telephone call to Ambassador Gallegos at the Ecuadorian Embassy, in the presence of two members of the Ambassador's staff. However, instead of providing the United States' interpretation of Article II(7), Mr. Koh stated that the United States would give *no response at all*.¹⁰ He offered no explanation for the United States' refusal to provide its interpretation of Article II(7). He did not

⁸ Letter from A. A. Valenzuela to Minister R. Patiño, 23 Aug. 2010 (C-142).

⁹ Witness Statement of Luis Benigno Gallegos (23 May 2012), ¶ 7.

¹⁰ *Id.*, ¶ 8.

deny that the United States had an interpretation. Nor did he suggest that Ecuador was not entitled to know what it was. Mr. Koh simply said that the United States had decided that no response to Ecuador would be provided. This brought dialogue about the matter to a close.

20. Surprised by the United States' *volte face*, which was contrary not only to Mr. Koh's previous assurances but also to Assistant Secretary of State Valenzuela's statement that the United States would "remain[] in contact" with Ecuador about the interpretation of Article II(7), Ambassador Gallegos informed Mr. Koh that he would report the United States' decision to his capital.

21. That day, Ambassador Gallegos duly reported the United States' refusal to provide an interpretation of Article II(7) to Ecuador's Minister of Foreign Affairs, Trade and Integration.¹¹

22. Despite Mr. Koh's categorical refusal to respond to Ecuador's request for the U.S. interpretation of Article II(7), Ecuador refrained from initiating arbitration proceedings immediately, in hopes that the United States might change its position and arbitration might be avoided. Ecuador thus waited until June 28, 2011 – more than eight months after receiving Mr. Koh's message and nearly a full year after it had first sought to discuss the interpretation of Article II(7) with the United States – before initiating these proceedings. Ecuador commenced arbitration only as a last resort, and only after raising the issue with the United States bilaterally, and having its efforts to engage in discussions firmly and definitively rebuffed.

¹¹ Ambassador Gallegos described Mr. Koh's statement in a report to the Ecuadorian government that was prepared later that day. That report, which was written in Spanish, did not quote Mr. Koh's statement in English (the language Mr. Koh had used) but rather described in Spanish what he had said in English. Gallegos Witness Statement, 23 May 2012, ¶ 9.

23. Ecuador's decision to begin this proceeding reflects the paramount importance that it places on clarifying the scope of its obligations under Article II(7). Ecuador is committed to complying with all of its international legal obligations, including those concerning the treatment of United States investors in regard to the administration of justice as set forth in Article II(7) of the Treaty.

A. Article VII Authorizes the Tribunal to Make a Binding Decision in a Dispute Concerning the Interpretation and Application of Article II(7) in Any Dispute Between the Treaty Parties Concerning the Meaning or Application of that Provision

24. The United States bases its objection to this Tribunal's jurisdiction principally on the argument that international courts and tribunals are constitutionally incapable of adjudicating disputes over matters in the abstract and thus, the United States contends, a more "concrete" dispute regarding the breach of the treaty is required for a court or tribunal to be able to exercise its judicial function.

25. This contention has no basis in international law. Article VII confers jurisdiction over "any dispute" concerning "interpretation or application" of the Treaty. Both the ordinary meaning of this provision and the jurisprudence of international courts and tribunals confirm that a Tribunal, such as this one, is entitled to exercise jurisdiction over disputes that are abstract, so long as the dispute in question concerns a matter of treaty "interpretation" or "application." Contrary to the United States' attempt to assert otherwise, there is no *a priori* requirement that the dispute concern a breach of treaty obligations. Nor does international law impose a greater requirement of concreteness than what is already established under Article VII.

1. The Ordinary Meaning of the Terms of Article VII Grants Jurisdiction over Any Dispute Concerning Interpretation or Application of Article II(7).

26. The Tribunal's jurisdiction over this dispute derives from Article VII(1) of the Treaty, which provides:

Any dispute between the Parties concerning the interpretation or application of the Treaty which is not resolved through consultations or other diplomatic channels, shall be submitted, upon the request of either Party, to an arbitral tribunal for binding decision in accordance with the applicable rules of international law.

27. The plain meaning of Article VII, interpreted in accordance with Article 31 of the Vienna Convention on the Law of Treaties, thus establishes that the Parties have conferred this Tribunal with the widest possible grant of jurisdiction: the competence to arbitrate “any dispute ... concerning the interpretation or application of the Treaty.” The Permanent Court of International Justice (“PCIJ”), interpreting a similarly formulated compromissory clause, held that a court or tribunal seised under such a provision may exercise jurisdiction over a “*dispute ... of any nature*” because the clause’s jurisdictional reach “is as comprehensive as possible.”¹²

28. The fact that the Contracting Parties phrased Article VII’s grant of jurisdiction in the disjunctive -- providing for jurisdiction over any dispute concerning “interpretation or application” -- is also significant. It signifies the Parties’ intention to confer upon a tribunal jurisdiction over disputes concerning both the interpretation of the Treaty, and separately,

¹² *The Mavrommatis Palestine Concessions*, Collection of Judgments, 1924, P.C.I.J. Series A, No. 2, p. 11 (C-148) (“Mavrommatis”), interpreting the following compromissory clause: “The Mandatory agrees that, if any dispute whatever should arise between the Mandatory and another Member of the League of Nations relating to the interpretation or the application of the provisions of the Mandate, such dispute, if it cannot be settled by negotiation, shall be submitted to the Permanent Court of International Justice provided for by Article 14 of the Covenant of the League of Nations.”

disputes concerning its application. In other words, the Parties contemplated two distinct and independent legal grounds for the submission of disputes to arbitration: a dispute regarding interpretation of the Treaty may be submitted for arbitration without also simultaneously requiring there to be a dispute regarding the Treaty's application, and *vice versa*.

29. Although the United States attempts to conflate interpretation and application, international law is clear that “interpretation” and “application” are distinct concepts. The distinction is expressed succinctly in the Harvard Law School Draft Convention on the Law of Treaties, which defines “interpretation” as “the process of determining the meaning of a text.” “[A]pplication,” on the other hand, is “the process of determining the consequences which, according to the text, should follow in a given situation.”¹³

30. As a consequence, disputes over interpretation and application can be litigated or arbitrated independently of one another. This was recognized, for instance, by Judge Higgins in the *Oil Platforms* case,¹⁴ when she concluded that the phrase “application or interpretation” contains “two distinct elements which may form the subject-matter of a reference to the Court.”¹⁵

¹³ Harvard Law School's Draft Convention on the Law of Treaties (C-134). The distinction has been expressed on many occasions. In *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania*, Advisory Opinion (30 Mar. 1950), I.C.J. Reports 1950, p. 29-31 (C-137), the PCIJ stated: “Treaty interpretation refers to the “construction” of the “scope” and “bearing” of a specific provision and its terms.” In *Case concerning a boundary dispute between Argentina and Chile concerning the delimitation of the frontier line between boundary post 62 and Mount Fitzroy*, RIAA Vol. XXII (1994), ¶ 75 (C-121): “[i]nterpretation is a legal operation designed to determine the precise meaning of a rule.” In *Case Concerning the Factory at Chorzów*, Dissenting Opinion of Judge Ehrlich (Judgment-Jurisdiction), 1927, P.C.I.J. Series A, No. 9, p. 39 (C-127): Interpretation constitutes the process of “determining the meaning of a rule” while application is the process of “determining the consequences which the rules attaches to the occurrence of a given fact”.

¹⁴ In the *Oil Platforms* case, the dispute between Iran and the United States was brought before the Court on the jurisdictional basis of Article XXI(2) the 1955 Treaty, which provides that “Any dispute between the High Contracting Parties as to the interpretation or application of the present Treaty, not satisfactorily adjusted by diplomacy, shall be submitted to the International Court of Justice, unless the High Contracting Parties agree to settlement by some other pacific means.” *Oil Platforms (Islamic Republic of Iran v. United States of America)*, Preliminary Objection, Judgment (12 Dec. 1996), I.C.J. Reports 1996, p. 803 *et seq.*, ¶ 15 (C-75).

31. The fact that a dispute over treaty interpretation is justiciable separately from, and in the absence of, a dispute regarding application was also recognized by Judge Schwebel who made the point in connection with a discussion of breach (which is a subset of the broader category of “application”). He explains in his Separate Opinion in *Headquarters Agreement* that “every allegation by a party of a breach of a treaty provision...necessarily entails elements of interpretation by the parties and by any court adjudging them, because an application or misapplication of a treaty, however clear, is rooted in an interpretation of it.”¹⁶ Nevertheless, even in the absence of allegations of treaty breaches, a lack of “concordance of views of the parties concerning [the treaty] interpretation” can independently give rise to a dispute over interpretation.¹⁷

32. Indeed, the United States itself acknowledged the distinction in the *United States Diplomatic and Consular Staff in Tehran* case. There, the United States asserted claims against Iran based on their FCN treaty’s compellatory clause, which conferred jurisdiction in regard to “any dispute... as to the interpretation or application” of the treaty. The United States accepted that under this provision interpretation-based disputes are separately justiciable from application-based disputes. In particular, the United States argued that “if the Government of Iran had made some contention in this Court that the United States interpretation of the Treaty is incorrect *or* that the Treaty did not apply to Iran’s conduct in the manner suggested by the United States, the

¹⁵ *Oil Platforms (Islamic Republic of Iran v. United States of America)*, Preliminary Objection, Separate Opinion of Judge Higgins (12 Dec. 1996), I.C.J. Reports 1996, p. 803 *et seq.*, ¶ 3 (C-144).

¹⁶ *Applicability of the Obligation to Arbitrate Under Section 21 of the United Nations Headquarters Agreements of 26 June 1947*, Separate Opinion of Schwebel, p. 51 (C-118).

¹⁷ *Id.*

Court could clearly be confronted with a dispute relating to the “interpretation or application of the Treaty.”¹⁸ In other words, a dispute concerning the interpretation of a treaty may arise *independently* of a dispute regarding application, as long as the parties have different views on the meaning and scope of a treaty provision.

33. The United States’ acceptance that a pure interpretative dispute is permissible is also clear from its description of the negotiating history of the FCN treaty, which reflects the United States’ success in persuading Iran to retain references to both “interpretation” and “application” in the compromissory clause, which indicates that they are different categories of disputes, both of which are justiciable in the absence of the other. The United States explained:

It is significant that during the negotiation of the Treaty Iran sought to delete the term “application” from the text and that the United States successfully resisted that suggestion, precisely because the United States wanted to avoid any narrowing of the jurisdictional provision.¹⁹

34. This is unambiguous evidence that an Article VII tribunal may exercise jurisdiction over a dispute regarding interpretation of a treaty in the absence of a claim that the treaty has been breached. Had interpretative disputes been predicated on allegations of treaty breaches – as the United States argues in the present case – the compromissory clause’s grant of jurisdiction could not have been “narrowed” by deleting the reference to “application.”²⁰

¹⁸ *United States Diplomatic and Consular Staff in Tehran (United States of America v. Iran)*, Memorial of the Government of the United States of America (12 Jan. 1980), p. 153 (C-151).

¹⁹ *Id.*

²⁰ The plain meaning of Article VII is so clear on its face that the United States’ argument calling for its restrictive interpretation is glaringly misplaced (See MJ, pp. 20-21.). First, as a threshold matter, “there is no rule that requires a restrictive interpretation of compromissory clauses” and international courts and tribunals in inter-State disputes have “no judicial policy of being either liberal or strict in deciding the scope of compromissory clauses: they are judicial decisions like any other.” (See Judge Higgins Separate Opinion in *Oil Platforms*, para. 35.) The

2. International Courts and Tribunals Have Routinely Interpreted Compromissory Clauses Similar to Article VII as Conferring Jurisdiction over Disputes Concerning a Treaty Interpretation Without Allegations of Breaches

35. The United States attempts to bolster its argument by making the bold claim that no international court or tribunal has *ever* exercised jurisdiction over a dispute concerning interpretation of a treaty in the abstract without also requiring that the dispute be grounded in something more concrete.²¹ This argument is manifestly incorrect.

36. As an initial matter, the jurisdiction of an international tribunal to adjudicate an abstract dispute over treaty interpretation was explicitly accepted by the PCIJ in *Certain German Interests in Polish Upper Silesia*.²² There, the Court held that a jurisdictional objection based on the allegedly abstract character of the question forming the subject of submission was “ill-founded” because a State is not precluded from seizing a tribunal’s jurisdiction in relation to an abstract issue of treaty interpretation.

37. In particular, the PCIJ observed that “Article 14 of the Covenant gives the Court power to ‘hear and determine any dispute of an international character which the Parties thereto submit to it.’” Moreover, “[t]here are numerous clauses giving the Court compulsory jurisdiction in questions of the interpretation and application of a treaty, and these clauses, amongst which is

compromissory clauses thus should be interpreted neither restrictively nor expansively. Rather they should be construed so as to give them their effect. As the PCIJ held in the *Free Zones*: “in case of doubt, the clauses of a special agreement by which a dispute is referred to the Court *must*, if it does not involve doing violence to their terms, *be construed in a manner enabling the clauses themselves to have appropriate effects.*” (*Case of the Free Zones of Upper Savoy and the District of Gex*, Order of 19 August 1929, PCIJ, Series A, No.22, p.13.) The United States’ construction of Article VII as not conferring upon this Tribunal jurisdiction over disputes concerning the interpretation of the Treaty does violence to the express terms of the Contracting Parties’ agreed-upon compromissory clause.

²¹ Memorial on Jurisdiction, pp. 21-22.

²² *Certain German Interests in Polish Upper Silesia*, Judgment (Merits), 1926, P.C.I.J. Series A, No. 7 (C-130).

included Article 23 of the Geneva Convention, *appear also to cover interpretations unconnected with concrete cases of application.*” In addition, the Court noted, “there is no lack of clauses which refer solely to the interpretation of a treaty; for example, letter *a* of paragraph 2 of Article 36 of the Court’s Statute.” The PCIJ therefore held:

There seems to be no reason why States should not be able to ask the Court to give an abstract interpretation of a treaty; *rather would it appear that this is one of the most important functions which it can fulfill.* It has, in fact, already had occasion to do so in Judgment No. 3 [*Treaty of Neuilly*].²³

38. As Professor McCaffrey observes, the PCIJ in this case “simply gave the term “interpretation,” when appearing in a jurisdictional provision, its natural meaning: the tribunal in question has jurisdiction to interpret a treaty provision when the interpretation is unconnected with a concrete case.”²⁴ The Court also -- importantly for the present case -- recognized that “giv[ing] an abstract interpretation of a treaty” is “one of the most important functions which it can fulfill.”²⁵

39. The *Case Concerning Rights of Nationals of the United States of America in Morocco* provides another example of a court exercising jurisdiction over a purely interpretive dispute in the abstract. There, France instituted proceedings against the United States, referring *inter alia*, to Article 36(2) of the ICJ Statute and the Treaty of Peace and Friendship between the United

²³ *Id.* pp. 18-19 (emphasis added) (citing Interpretation of Paragraph 4 of the Annex Following Article 179 of the Treaty of Neuilly, Judgment No. 4, P.C.I.J., Ser. A, No. 3, September 12th, 1924, p. 4.).

²⁴ McCaffrey’s Opinion, para. 37.

²⁵ *Id.*

States and Morocco of 16 September 1836 (the 1836 Treaty).²⁶ Without alleging any breach of treaty obligations, France requested the Court to adjudge and declare:

That the privileges of the nationals of the United States of America in Morocco are only those which result from the text of Articles 20 and 21 of the Treaty of September 16th, 1836, and that since the most-favoured-nation clause contained in Article 24 of the said treaty can no longer be invoked by the United States in the present state of the international obligations of the Shereefian Empire, there is nothing to justify the granting to the nationals of the United States of preferential treatment which would be contrary to the provisions of the treaties;

...

That no treaty has conferred on the United States fiscal immunity for its nationals in Morocco, either directly or through the effect of the most-favoured-nation clause...²⁷

40. The subject-matter of France's claims thus concerned interpretative questions concerning the scope of France's obligations to the United States, namely differing interpretations of most-favored-nation clauses affecting U.S. consular jurisdiction in the French Zone of Morocco.²⁸

According to the United States, the MFN clauses in treaties with Morocco entitled it to exercise consular jurisdiction beyond the bounds established by the 1836 Treaty.²⁹ France, on the other hand, submitted that the MFN clauses could not import rights and privileges from treaties that had ceased to be operative.³⁰ The Court agreed with France, thereby clarifying the rights and

²⁶ *Rights of Nationals of the United States of America in Morocco (France v. United States of America)*, Judgment (27 Aug. 1952), I.C.J. Reports 1952, p. 176 *et seq.* (C-85).

²⁷ *Id.* p. 203.

²⁸ *Id.* p.190.

²⁹ *Id.*

³⁰ *Id.* pp.190-191.

obligations between the parties and removing uncertainty from their legal relationship.³¹ The import of this case is clear: an international tribunal can adjudicate disputes over treaty interpretation in the abstract.

41. The United States also neglects to mention the jurisprudence of the Iran-U.S. Claims Tribunal (“IUSCT”), which, like the ICJ, has exercised jurisdiction over matters of abstract interpretation. For example, in *Case No. A/2*, Iran relied on analogous compromissory clauses under the General Declaration³² and Claims Settlement Declaration³³ conferring jurisdiction over “any dispute” as to “the interpretation or performance of any provision” of those Declarations, and submitted a claim arising out of a purely interpretative controversy. Iran interpreted that those Declarations as entitling it to bring claims against U.S. nationals before the Tribunal. The United States disagreed. The Tribunal, however, ruled that the Declarations provide an adequate basis of jurisdiction to resolve the dispute concerning treaty interpretation, even in the absence of an allegation of breach:

According to article VI paragraph 4 of the Claims Settlement Declaration, “any question concerning the interpretation or application of this agreement shall be decided by the Tribunal upon

³¹ *Id.* p.201.

³² General Declaration

17. *If any other dispute arises between the parties as to the interpretation or performance of any provision of this Declaration, either party may submit the dispute to binding arbitration by the tribunal established by, and in accordance with the provisions of, the Claims Settlement Agreement. Any decision of the tribunal with respect to such dispute, including any award of damages to compensate for a loss resulting from a breach of this Declaration or the Claims Settlement Agreement, may be enforced by the prevailing party in the courts of any nation in accordance with its laws.*

³³ Claims Settlement declaration

Article II(3). The Tribunal shall have jurisdiction, as specified in Paragraphs 16-17 of the Declaration of the Government of Algeria of January 19, 1981, over any dispute as to the interpretation or performance of any provision of that Declaration.

Article VI(4) 4. Any question concerning the interpretation or application of this Agreement shall be decided by the Tribunal upon the request of either Iran or the United States.

request of either Iran or the United States”, and according to paragraph 17 of the General Declaration, and Article II, paragraph 3 of the Claims Settlement Declaration, any dispute arising between the parties as to the interpretation of any provision of the General Declaration may be submitted by either party to binding arbitration by the Tribunal. *On that dual basis, the Tribunal has not only the power but the duty to give an interpretation on the point raised by Iran.*³⁴

Fulfilling this jurisdictional mandate, the IUSCT rendered its interpretation of the disputed provisions of the Declarations, thereby removing the existing uncertainty from the parties’ legal relationship.

42. *Case No. A/17* is another example of the exercise of jurisdiction over a purely interpretative dispute. There, the case concerned a claim by the United States on the same jurisdictional title as in *Case No. A/2*.³⁵ The United States’ request, however, did not raise an allegation of treaty breach. Instead, it only requested the Tribunal to determine whether the Declarations can be interpreted as conferring jurisdiction over certain pending claims before the Chamber that had been brought by Iranian banks against U.S. banking institutions. Taking note that the United States’ submission had been formulated as relating to “a dispute or question concerning the interpretation, performance or application of the Algiers Declarations,” the Tribunal rendered an interpretation, holding that “[a]s jurisdiction in none of the claims in question has been relinquished to the Full Tribunal, the final and conclusive determination of

³⁴ *Islamic Republic of Iran v. United States of America*, Iran-U.S. Claims Tribunal, Case No. A/2, Decision No. DEC 1-A2-FT (26 Jan. 1982), Decision, Part II (C-139).

³⁵ *United States of America v. The Islamic Republic of Iran*, Iran-U.S. Claims Tribunal, Case A/17, Decision No. DEC .37-A17-FT (18 Jun. 1985) (C-152). The United States requested the Tribunal to determine the extent to which the Tribunal has jurisdiction over Iranian bank claims against entities alleged to be U.S. banking institutions that were currently pending before the Chamber. The tribunal noted that the request had been made by the United States “as a dispute or question concerning the interpretation, performance or application of the Algiers Declarations.” *Id.* Part III- Merits, ¶ 1.

jurisdiction in each case rests with the Chamber to which that claim is assigned, and *the present decision concerns merely interpretative guidance.*³⁶ Moreover, the Tribunal gave its interpretation even where it was capable of affecting determinations of jurisdiction by the Chamber of the Tribunal in pending cases.³⁷

43. In short, the IUSCT's decisions in *Case No. A/2* and *Case No. A/17* contradict the United States' assertion that a tribunal cannot exercise jurisdiction over a claim that is based exclusively on a dispute over interpretation.³⁸

44. Other arbitral tribunals have also exercised jurisdiction over disputes concerning treaty interpretation in the abstract. For example, in *Pensions of Officials of the Saar Territory*, the tribunal did not decline to exercise jurisdiction over a dispute concerning a matter of pure treaty interpretation. In that case, the dispute at issue related to the interpretation of Article 10 of the Agreement of Baden-Baden concerning German Officials.³⁹ No allegations of treaty breaches were asserted. Nor did the arbitrator enquire into their existence as a necessary condition to give

³⁶ *Id.* In relevant part, the tribunal stated: “[a]s jurisdiction in none of the claims in question has been relinquished to the Full Tribunal, the final and conclusive determination of jurisdiction in each case rests with the Chamber to which that claim is assigned, and *the present decision concerns merely interpretative guidance.*” (emphasis added).

³⁷ *United States of America v. The Islamic Republic of Iran*, Iran-U.S. Claims Tribunal, Case A17, Decision No. DEC .37-A17-FT (18 Jun. 1985) (C-152).

³⁸ This conclusion follows with even greater force when one takes into account the fact that the Tribunal was “required to satisfy itself *proprio motu* that it has jurisdiction in each case even if no objection is raised by a respondent.” As the guardian of its own jurisdiction, the Tribunal by necessity have had to have declined to exercise jurisdiction, had the lack of breach allegations constituted an inherent limitation on its competence to provide the general interpretation of a treaty provision. But, as the Tribunal stated, it “had not only the power but the duty to give an interpretation,” and thus resolved those interpretative disputes. The same is true here: Article VII vests this Tribunal with all the power it needs to resolve the dispute over the interpretation of Article II(7).

³⁹ *Pensions of officials of the Saar Territory (Germany, Governing Commission of the Saar Territory)*, RIAA Vol. III (1934), pp.1555-1556 (C-145).

an interpretation. A general interpretation of Article 10 was given and the mutual legal obligations of the parties were clarified.⁴⁰

45. Similarly, in the case concerning *Interpretation of the Statute of the Memel Territory*, the PCIJ had to interpret Article 17 of the Statute of the Memel Territory, which stated that “any *difference of opinion in regard to questions of law or of fact* concerning these provisions” constituted “a dispute of an international character” that had to be submitted to the PCIJ.⁴¹ The Court held that a difference of opinion in regards to questions of law or of fact – *i.e.*, a dispute – may arise even without any allegation of a treaty breach. The Court explained:

The actual text of Article 17 shows that the two procedures relate to different objects. The object of the procedure before the Council is the examination of an “infraction of the provisions of the Convention”, *which presupposes an act already committed, whereas the procedure before the Court is concerned with “any difference of opinion in regard to questions of law or fact.” Such difference of opinion may arise without any infraction having been noted.*⁴²

⁴⁰ *Id.* pp.1562-1568.

⁴¹ Article 17 provides:

The High Contracting Parties declare that any Member of the Council of the League of Nations shall be entitled to draw the attention of the Council to any *infraction of the provisions* of the present Convention. In the event of any *difference of opinion in regard to questions of law or of fact concerning these provisions* between the Lithuanian Government and any of the Principal Allied Powers members of the Council of the League of Nations, such difference shall be regarded as a dispute of an international character under the terms of Article 14 of the Covenant of the League of Nations. The Lithuanian Government agrees that all disputes of this kind shall, if the other Party so requests, be referred to the Permanent Court of International Justice. ...

Interpretation of the Statute of the Memel Territory, Judgment (Preliminary Objections) (1932), P.C.I.J. Series A/B, No. 49, p. 247 (C-138).

⁴² *Id.* p. 248

46. In short, the decisions of international courts and tribunals confirm that the Tribunal's exercise of jurisdiction over a dispute concerning the interpretation of the Treaty need not be predicated on an allegation that the treaty has been breached.

47. The case relied upon by the United States to try to show otherwise does not assist it. In that regard, the U.S. argues that the decision by the Anglo-Italian Commission in *Dual Nationality Claims* case establishes the general proposition that a tribunal cannot exercise its jurisdiction over a dispute concerning the general interpretation of a treaty provision, except in regard to concrete cases and only to resolve those specific claims.⁴³

48. However, that claim is manifestly wrong. The *Dual Nationality Claims* case provides no basis for this proposition. Its decision not to exercise jurisdiction over an issue of treaty interpretation was not based as the United States asserts on any general rule of international law precluding such an exercise. Rather, it declined jurisdiction because the Conciliation Commission had to give effect to a compromissory clause that *expressly required the existence of a prior concrete claim*. Indeed, notwithstanding the United States' bold assertion that the compromissory clause of the 1947 Peace Treaty and Article VII of the BIT are "virtually identical," they are actually very different.⁴⁴

49. The compromissory clause of the 1947 Peace Treaty is set forth in Article 83.⁴⁵ It established a two-stage dispute settlement mechanism for resolving, *inter alia*, disputes

⁴³ Memorial on Jurisdiction, p.57.

⁴⁴ Memorial on Jurisdiction, p.22.

⁴⁵ Article 83 Provides:

pertaining to the return of property by the Italian government to nationals of United Nations member states as required by Article 78 of the Treaty.⁴⁶ At the first stage, Article 83(1) provided that “[a]ny disputes which may arise in giving effect to” specific provisions of the Peace Treaty⁴⁷ “shall be referred to a Conciliation Commission consisting of the Government of the United Nation concerned and one representative of the Government of Italy.”⁴⁸ If the two-member Commission succeeds in resolving the dispute, the matter ended there. But, if the two-member Commission fails to resolve the dispute within three months, Article 83’s second stage is triggered. Article 83(1) requires the appointment of a third member to the Commission to achieve a final resolution to the dispute, while Article 83(2) grants the three-person Commission

1. Any disputes which may arise in giving effect to Articles 75 and 78 and Annexes XIV, XV, XVI and XVII, part B, of the present Treaty shall be referred to a Conciliation Commission consisting of one representative of the Government of the United Nation concerned and one representative of the Government of Italy, having equal status. If, within three months after the dispute has been referred to the Conciliation Commission no agreement has been reached, either Government may ask for the addition to the Commission of a third member selected by mutual agreement of the two Governments from nationals of a third country. Should the two Governments fail to agree within two months on the selection of third member of the Commission, the Governments shall apply to the Ambassadors in Rome of the Soviet Union, of the United Kingdom, of the United States of America, and of France, who will appoint the third member of the Commission. If the Ambassadors are unable to agree within a period of one month upon the appointment of the third member, the Secretary- General of the United Nations may be requested by either party to make the appointment.

2. When any Conciliation Commission is established under paragraph 1 above, it shall have jurisdiction over all disputes which may thereafter arise between the United Nation concerned and Italy in the application or interpretation of Articles 75 and 78 and Annexes XIV, XV, XVI, and XVII, part B, of the present Treaty, and shall perform the functions attributed to it by those provisions.

The Anglo-Italian Conciliation Commission established under Article 83 of the Treaty of Peace with Italy (United Kingdom, Italy), UNRIAA, (1952-1961), VOLUME XIV pp. 1-66, at p.5

⁴⁶ The relevant part of Article 78 provides:

1. In so far as Italy has not already done so, Italy shall restore all legal rights and interests in Italy of the United Nations and their nationals as they existed on June 10, 1940, and shall return all property in Italy of the United Nations and their nationals as it now exists.

⁴⁷ See *supra* note 45.

⁴⁸ *Id.*

jurisdiction over all *subsequent* disputes concerning the application or interpretation of the specific treaty provision *connected to the dispute originally submitted* to the two-member Conciliation Commission.

50. The two-stage procedure established by Articles 83(1) and (2) therefore required the satisfaction of each of the following elements *before* the Commission could exercise its jurisdiction over the interpretation of the Peace Treaty:

First, a member-state of the United Nations or one of its nationals had to submit a claim to the Italian Government under Article 78 of the Peace Treaty for the return of property.

Second, the Italian government must have refused to honor that property claim before a dispute could even arise between Italy and a United Nation State.

Third, any dispute arising out of that concrete property claim had to be submitted to a two-member Conciliation Commission under Article 83(1).

Fourth, the two-person Conciliation Commission had to fail to resolve the dispute within three months before a third person could be appointed pursuant to Article 83(1).

Fifth, only if all of the above conditions had been satisfied could the three-person Commission be properly seized with jurisdiction to give its interpretation of the Treaty pursuant to Article 83(2).

51. The United Kingdom failed to satisfy these elaborate jurisdictional prerequisites. Instead of submitting a request for the interpretation of the Treaty to resolve a dispute arising from Italy's failure to honor a concrete claim under Article 78 for the return of property, the United Kingdom requested that the Conciliation Commission give a general interpretation on whether the Treaty entitled United Nations nationals to bring claims before the Commission if they had

previously possessed Italian nationality.⁴⁹ Although the request was presented as an abstract legal question outside the context of any particular claim,⁵⁰ the United Kingdom intended to use the interpretative ruling as binding authority for all future cases involving concrete claims by dual nationals.⁵¹ But the Conciliation Commission had no authority to do that because of the limitations imposed by Article 83. Moreover, in the context of a multilateral treaty, the Commission was especially mindful not to exceed the limits of its jurisdiction and make an abstract interpretation of future application that would be binding on all parties without their express consent. It explained:

The Conciliation Commission judges: *it is not given to it to exceed the limits which the Peace Treaty assigns formally to its jurisdiction.* If it is a question therefore, without any shadow of doubt, of the exercise of a jurisdictional function (*an authentic interpretation would demand, as definition, the agreement of all the contracting parties*), the authors (denying unanimously the admissibility of an unilateral interpretation, in the sense that they exclude the possibility of forcing one of the parties to accept an interpretation adopted by the other party) if it is the case, it is repeated, of a jurisdictional function, one can only conclude that the *Commission must limit its activities to determining the disputes arising from claims presented according to the terms of Article 78 of the Peace Treaty the understanding of jurisdiction being the same in international and internal law.* One cannot exceed the limits which the principles, the text and the spirit assign to the competence of the Commission. An interpretation according to which the Commission would also have the faculty to interpret the provisions of the Peace Treaty in *an abstract and general manner, with obligatory effect for all future cases, would run the risk, because it is abusive, of ending in a judgment blemished by excess of power (it would create rules of law, which is not a jurisdictional function, but a legislative function), a very serious position in our*

⁴⁹ *Cases of Dual Nationality*, Anglo-Italian Conciliation Commission, Decision No. 22 (May 8, 1954), UNRIAA Vol. XIV (2006), pp. 28, 31 (R-30).

⁵⁰ *Id.*

⁵¹ *Id.*

*case precisely because, according to the provision of paragraph 6 of Article 83 of the Peace Treaty, the decision is considered as definitive and binding.*⁵²

52. Thus, viewed in its proper light, it is hardly surprising that the Conciliation Commission declined the United Kingdom's request for it to give a general interpretation of the Peace Treaty beyond the context of a specific controversy. But the treaty-based limitations found in the Peace Treaty have no analogues in Article VII of the Ecuador-U.S. BIT, which as stated above, gives the tribunal plenary authority to arbitrate "any dispute" concerning "interpretation or application." In short, the fundamental differences between the compromissory clauses of Article 83 of the Peace Treaty and Article VII of the BIT render the *Dual Nationals Claim* case wholly inapposite here.

53. That being said, had the United Kingdom requested a general interpretation of a Treaty provision in the context of a specific Article 78 claim, the Commission might well have given such interpretation. Indeed, conciliation commissions constituted under the Peace Treaty did exactly that in other cases. In the *Amabile* case, for example, the U.S.-Italian Commission was seized with a dispute concerning Article 78(4)(a) of the Treaty, which obligated Italy either to restore property to United Nations nationals or to pay compensation.⁵³ The United States sought compensation on behalf of one of its nationals after Italy rejected a private property claim because it had been based on *ex parte* testimonial instruments, which Italy considered as lacking evidentiary value. The United States put before the Commission a broadly formulated question of whether the submission of a claim based only on *ex parte* testimonial instruments created

⁵² *Id.* p.34 (emphasis added).

⁵³ This provision obligates Italy to restore property or pay compensation if property cannot be restored.

certain responsibilities for Italy to investigate the claim if it was not *prima facie* frivolous or fraudulent.⁵⁴ This matter of treaty interpretation was unconnected to any particular dispute.

54. The Conciliation Commission had no difficulty exercising jurisdiction over this dispute,⁵⁵ and it interpreted the Peace Treaty and ancillary Agreements as permitting acceptance of *ex parte* testimonial instruments.⁵⁶ The Commission also made a general interpretive declaration that the

⁵⁴ The U.S. formulated that question thusly:

Can the Italian Government evade the obligation imposed on it to compensate United Nations Nationals under Article 78 of the Treaty of Peace by disregarding as insufficient the evidence submitted consisting of uncontested statements by the Claimant and by presumably credible witnesses concerning the existence, value and loss of the property in the absence of any showing that the facts are at the variance with those alleged?

Amabile Case - Decision No. 11, RIAA Vol. XIV (1952), p.119 (C-116).

⁵⁵ The Commission formulated the questions of treaty interpretation thusly:

Are Affidavits, *Atti di Notorietá*, signed statements and similar *ex parte* testimonial instruments forms of evidence which can be submitted to the Conciliation Commission in disputes presented by the Agents of the two Governments to establish the ownership, loss and/or value of personal property in Italy which was not sequestered by the Italian Government, when other forms of evidence are not available to document the claim?

When a national of the United States of America submits a claim for war damages to the Government of the Italian Republic, is there an obligation on the Government of the Italian Republic under the Treaty of Peace, as implemented by the Memoranda of Understanding and the exchange of notes dated August 14, 1947, to conduct such an investigation of the claim as may be necessary to establish or refute the material allegations made by the Claimant, and thereafter to make a determination of the particular claim, even though essential elements of the claim can be established by the Claimant only with documentary evidence presented in the form of *ex parte* testimonial instruments?

What criteria will the Conciliation Commission follow in determining the evidentiary weight or probative value to be given to such Affidavits, *Atti di Notorietá*, signed statements and similar *ex parte* testimonial instruments?

Id. p.122.

⁵⁶ *Id.* p.126.

Peace Treaty and its ancillary Agreements imposed on Italy obligations, *inter alia*, to investigate claims for property if they are not frivolous or fraudulent.⁵⁷

55. Significantly for the present case, the Commission observed that its interpretation of the Treaty on these points were meant to serve as “future guidance.”⁵⁸ The Commission’s decision thus confirms that – contrary to what the United States is arguing here – it is not inappropriate for a tribunal to interpret a treaty consistent with the terms of its compromissory clause. Indeed, a tribunal’s exercise of such jurisdiction was needed to assist the parties in clarifying what they must do to discharge their legal obligations in the future.

56. In the present case, Article VII expressly authorizes the Tribunal to resolve any dispute concerning interpretation and it contains no restrictions found in other compromissory clauses. The broad jurisdictional grant under Article VII reflects the Parties’ confidence in the Article VII arbitral process and their expectation that disputes in regard to interpretation would be resolved in that manner. As the tribunal in *Question of the Re-evaluation of the German Mark*, another arbitration where the tribunal addressed issues of treaty interpretation unconnected to an allegation of breach, stated:

The Applicant’s right to an authoritative interpretation of the clause in dispute ... is grounded on the bedrock of the considerations which the Applicants gave and the concessions which they made in exchange for the disputed clause. They have a right to know what is the legal effect of the language used. The

⁵⁷ *Id.* p.129.

⁵⁸ *Id.* p.123.

Tribunal in the exercise of its judicial functions is obliged to inform them.”⁵⁹

The situation presented here is no different. Article VII of the Treaty vests the Tribunal with the competence to interpret the meaning of Article II(7) and to inform the Parties of the scope of their mutual obligations thereunder. The United States has identified no reason why this jurisdiction should not be exercised.

3. International Law Imposes No Requirement of Allegation of Breach or Any Other Measure of Concreteness Beyond That Articulated by Ecuador in its Request for Arbitration

57. The United States asserts that “a dispute must be concrete in the sense that one Party claims that the other Party’s act or omission has violated its legal rights, thereby warranting judicial relief capable of affecting the Parties’ rights and obligations.”⁶⁰ From this flawed legal premise the United States moves to conclude that no *concrete* dispute exists here because Ecuador “points to *no actual dispute* with the United States, but to a need for *guidance in its domestic implementation of the Treaty*”.⁶¹ In so far as the United States may be suggesting that the existence of breach may constitute a necessary requirement to establish the concreteness of a dispute, this argument is fatally flawed.

58. First, just as international law contains no requirement that a breach allegation must exist for a dispute to arise, so too is there no such requirement in relation to whether a dispute is sufficiently concrete. The authorities cited above demonstrate beyond cavil the lack of any

⁵⁹ *The Question whether the re-evaluation of the German Mark in 1961 and 1969 constitutes a case for application of the clause in article 2(e) of Annex I A of the 1953 Agreement on German External Debts*, RIAA Vol. XIX (1980), p. 89 (C-149).

⁶⁰ Memorial on Jurisdiction, p. 21.

⁶¹ Memorial on Jurisdiction, p. 28.

foundation for the United States' assertion to the contrary. As Professor McCaffrey observes, just because States more often bring cases that arise out of alleged breaches than those calling for an interpretation of a treaty, "such a phenomenon should not lead to the conclusion that the latter class of cases cannot be brought before international tribunals.⁶² Indeed, as has been demonstrated above⁶³ and in the submitted expert opinions⁶⁴, international jurisprudence is replete with examples where the absence of breach allegations did not render purely interpretative disputes inadequately concrete for the purpose of adjudication.

59. Second, the United States' argument confuses two separate issues: an allegation of breach as one of the manifestations of a dispute and the existence of a concrete case capable of being resolved through adjudication. But the existence of a concrete case does not depend on the existence of breach. This is clear from the ICJ's Judgment in the *Northern Cameroons* case, which the United States mischaracterizes in an effort to elevate the requirement of concreteness far beyond what the Court had in mind.⁶⁵ Indeed, viewed in the light of all relevant facts – which the U.S. carefully chose to omit – *Northern Cameroons*, in fact, confirms Ecuador's argument that there exists a concrete dispute concerning the interpretation of Article II(7).

60. In *Northern Cameroons*, the ICJ was seized with Cameroon's application "to adjudge and declare" that the United Kingdom breached its obligations in applying the Trusteeship Agreement. But two days after filing the application, the Trusteeship Agreement was terminated

⁶² McCaffrey Opinion, ¶ 42.

⁶³ Part II, Section A(2), (3).

⁶⁴ McCaffrey Opinion, paras. 36, 38; Pellet Expert Opinion, paras. 11-14.

⁶⁵ Memorial on Jurisdiction, p.23.

by the UN. The Trust disappeared and what was formerly the Trust Territory of the Northern Cameroons had joined Nigeria, becoming part of that State. The United Kingdom ceased to have rights and obligations in regard to the Cameroons.⁶⁶ In essence, the Court was asked to address a situation that no longer existed. The Court thus declined to exercise jurisdiction, because “it would be impossible to render a judgment *capable of effective application.*” It explained:

the function of the Court is to state law, but it may pronounce judgment only in connection with *concrete cases where there exists at the time of the adjudication an actual controversy involving a conflict of interest between the parties. The Court’s judgment must have some practical consequence in the sense that it can affect existing legal rights or obligations of the parties, thus removing uncertainty from their legal relations.*⁶⁷

61. The Court found that no judgment on the merits in that case could satisfy these minimal prerequisites for the exercise of its judicial function. *First*, Cameroon’s claim was “solely for a finding of a breach of the Trusteeship Agreement” but “the substantive interest” sought to be protected “disappeared with the termination of the Agreement.”⁶⁸ *Second*, in the case of a dispute about the interpretation or application of a treaty that has been terminated, the Court’s judgment on the interpretation of that treaty has no “continuing applicability” and the contracting parties would have no opportunity to apply the Court’s interpretation.⁶⁹ Additionally, the Court stressed that Cameroon itself sought “to minimize the importance of the forward reach of the Judgment of

⁶⁶ *Case Concerning the Northern Cameroons (Cameroon v. United Kingdom)*, Judgment (Preliminary Objections) (2 Dec. 1963), I.C.J. Reports 1963, p. 15 *et seq.*, pp. 32-34 (C-129) (“Northern Cameroons”).

⁶⁷ *Id.* pp.33-34.

⁶⁸ *Id.* p.36.

⁶⁹ *Id.* p.37.

the Court" in regard to any declaration on point of law. Indeed, Cameroon specifically asked the Court "not to consider the aftermath of its judgment."⁷⁰

62. In contrast to *Northern Cameroons*, there exists in the present case an ongoing controversy involving the substantive interest related to the determination of obligations under Article II(7). This is exactly the situation in which, according to Professor Schreuer cited by the U.S., the disagreement between the parties has concrete "practical relevance to their relationship."⁷¹ The Tribunal's interpretation of this provision will have a clear practical consequence in the sense that it can authoritatively determine existing legal rights and obligations of the Contracting Parties, thus removing the existing uncertainty from the legal relations of Ecuador and the United States. The Tribunal's award of an authoritative interpretation will also have continuing applicability for future acts of interpretation or application of Article II(7) both by the Contracting Parties and tribunals constituted under Article VI. That is why Ecuador is specifically seeking such a decision. The importance of the forward reach of the Tribunal's award thus cannot be minimized.

63. Professors Pellet, McCaffrey and Amerasinghe all agree that the present dispute satisfies the requirement of concreteness within the meaning of *Northern Cameroons* and under international law generally, and thus warrants the exercise of the tribunal's judicial function to determine authoritatively the legal rights and obligations between Ecuador and the United States

⁷⁰ *Id.*

⁷¹ Memorial on Jurisdiction, p.25.

under Article II(7). Indeed, they also agree that the Tribunal’s exercise of jurisdiction over this dispute is “fully in keeping with the integrity of the functions of an arbitral tribunal.”⁷²

B. A Dispute Exists Regarding the Interpretation of Article II(7)

64. Ecuador has not, contrary to the United States’ mischaracterization of this arbitration, invented a dispute with the United States concerning the interpretation or application of Article II(7) of the Treaty.⁷³ To the contrary, the existence of a dispute concerning Article II(7) is clear from the United States’ express statements. It is also demonstrated by clear inference, most notably from the United States’ refusal to respond to Ecuador’s request regarding the interpretation of that provision, despite the fact that a response was unquestionably called for.

65. The existence of a dispute is the threshold question for the exercise of a judicial function.⁷⁴ International law defines a “dispute” as “a disagreement on a point of law or fact, a conflict of legal views or of interests between two persons.”⁷⁵ Although the United States denies the existence of the dispute in this case, the ICJ has made clear that the “mere denial” of a dispute by a respondent State “does not prove its non-existence.”⁷⁶ Instead, whether a dispute

⁷² Pellet, ¶ 38. See also Professor McCaffrey stating at ¶ 46: “In contrast to *Northern Cameroons*, there is a current controversy in the present case, and a decision of this Tribunal would have a continuing applicability – that is in fact the reason Ecuador is seeking such a decision. But the Court in *Northern Cameroons* could not have better described the situation in the present case when it referred to the kind of circumstances in which it would have proceeded further in the case, namely, those in which its judgment “can affect existing legal rights or obligations of the parties, thus removing uncertainty from their legal relations.” The Court referred to these circumstances as “essentials of the judicial function.” (C-129). Amerasinghe Expert Opinion, para. 21.

⁷³ Memorial on Jurisdiction, p. 36.

⁷⁴ *Nuclear Tests Case (New Zealand v. France)*, Judgment (20 Dec. 1974), I.C.J. Reports 1974, ¶ 58 (R-60) (“New Zealand v. France”).

⁷⁵ *Mavrommatis*, p. 11 (C-148).

⁷⁶ *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania*, Advisory Opinion (30 Mar. 1950), I.C.J. Reports 1950, p. 74 (C-137) (“Interpretation of Peace Treaties with Bulgaria, Hungary and Romania”).

exists is “a matter for objective determination,”⁷⁷ to be made by the court or tribunal. That objective determination “must turn on an examination of the facts,”⁷⁸ including the parties’ diplomatic exchanges and official statements, the Request for Arbitration, the submissions in the arbitration and their statements and conduct both prior to and after the commencement of legal proceedings.⁷⁹ As the ICJ has repeatedly made clear, substance prevails over form.⁸⁰

66. Here, the facts demonstrate that Ecuador and the United States are in dispute concerning the interpretation of Article II(7). The United States has manifested its positive opposition to Ecuador’s interpretation through its express statements showing that it considers Ecuador’s position to be “unilateral,” which necessarily means that the interpretation given to Article II(7) by Ecuador is not shared by the United States. Its express opposition is also manifest in its taking the position that the interpretation given by the *Chevron* tribunal is “*res judicata*” not only

⁷⁷ *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania*, p. 74 (C-137); *Case Concerning East Timor (Portugal v. Australia)*, Judgment (30 June 1995), I.C.J. Reports 1995, ¶ 22 (C-125) (“Portugal v. Australia”); *Case Concerning Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial incident at Lockerbie (Libyan Arab Jamahiriya v. United Kingdom)*, Preliminary Objections, Judgment (27 Feb. 1998), I.C.J. Reports 1998, ¶ 22 (C-126); *Case Concerning the Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria)*, Preliminary Objections, Judgment (11 June 1998), I.C.J. Reports 1998, ¶ 87 (C-128) (“Cameroon v. Nigeria”); *Case Concerning Certain Property (Liechtenstein v. Germany)*, Preliminary Objections, Judgment (10 Feb. 2005), I.C.J. Reports 2005, ¶ 24 (C-124) (“Liechtenstein v. Germany”); *Case Concerning Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda)*, Judgment (Jurisdiction) (2 Feb. 2006), I.C.J. Reports 2006, ¶ 90 (C-123) (“Congo v. Rwanda”).

⁷⁸ *Case Concerning Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation)*, Preliminary Objections, Judgment (1 Apr. 2011) (C-122) (“Georgia v. Russia”).

⁷⁹ *Fisheries Jurisdiction Case (Spain v. Canada)*, Judgment (Jurisdiction) (4 Dec. 1998), I.C.J. Reports 1998, ¶ 31 (C-132). (In determining whether there exists a dispute, the Court “base[s] itself not only on the Application and final submissions, but on diplomatic exchanges, public statements and other pertinent evidence”); *New Zealand v. France*, ¶ 29-31 (R-60). (Diplomatic correspondence and statements after the submission of the Application instituting proceedings may be relevant to establish the existence of a dispute: “In these circumstances, the Court is bound to take note of further developments, both prior to and subsequent to the close of the oral proceedings.”).

⁸⁰ “The matter is one of substance, not of form.” *Georgia v. Russia*, ¶ 30 (C-122); See also *Liechtenstein v. Germany*, ¶ 24 (C-124); *Congo v. Rwanda*, ¶ 90 (C-123).

for purposes of that dispute but also for Ecuador's relationships with other parties (including the United States).⁸¹

67. Further, the United States' opposition can also be ascertained by inference, including from its refusal to respond to Ecuador's request regarding the interpretation of Article II(7) when a response was unquestionably called for. That circumstances were such that a response was called for is demonstrated by the liability Ecuador will have wrongfully suffered as a result of the misinterpretation of the provision by the tribunal in the *Chevron* case, by the pressing need it has to determine what it must do to be in compliance with the provision and by its interest in avoiding future wrongful liability. In such circumstances, a response from the United States was called for and the refusal of the United States to respond, or indeed to countenance any further discussion about the matter, warrants, under principles of international law, a finding that there is a dispute.

1. The United States has Expressly Stated its Positive Opposition to Ecuador's Interpretation of Article II(7)

68. A dispute may be demonstrated by showing that the Respondent State has positively opposed the position of the Applicant State *expressly*.⁸² The United States, however, contends that no dispute exists here because it has avoided expressing opposition to Ecuador's interpretation of Article II(7).⁸³ That assertion, however, is belied by the facts. The United

⁸¹ Opinion of Prof. Reisman, ¶¶ 47-51.

⁸² *South West Africa Cases (Ethiopia v. South Africa; Liberia v. South Africa)*, Preliminary Objections, Judgment (21 Dec. 1962), I.C.J. Reports 1962, p. 328 (C-147).

⁸³ Memorial on Jurisdiction, p. 2.

States has manifested its positive opposition to Ecuador's interpretation of Article II(7) in multiple express ways.

69. As an initial matter, the United States' opposition is clear from its repeated references to Ecuador's view of Article II(7) as being "unilateral." For example, the Memorial asserts that Ecuador is seeking to impose upon the United States an "unilateral interpretation."⁸⁴ Similarly, the Statement of Defense characterizes Ecuador's position as expressing "Ecuador's *unilateral statement of the meaning of Article II(7)*."⁸⁵ And during the Preparatory Hearings, the United States stated that "Ecuador offered its *own* interpretation of Article II(7)"⁸⁶ and tried to secure from the United States "confirmation" of Ecuador's "*unilateral views*."⁸⁷

70. These are all statements that articulate the United States' express opposition to Ecuador's position. Describing Ecuador's interpretation of Article II(7) as "unilateral" necessarily means that it is not shared by the United States. An interpretation that is "unilateral," by definition, is one that is held by only one party, not both. Thus, in a bilateral relationship, where one party describes the other as holding a "unilateral" interpretation, it necessarily means there is disagreement over interpretation.

71. Other express statements by the United States also demonstrate its positive opposition. This is clear from its adoption of Professor Reisman's opinion that the principle of *res judicata* applies not only to Ecuador's relationship with the *Chevron* claimants for purposes of that

⁸⁴ *Id.* pp. 36, 42.

⁸⁵ Statement of Defense, p. 2.

⁸⁶ Koh's Statement during the Preparatory Hearing, 21 Mar. 2012, p .23, ¶¶ 2-3 (C-141).

⁸⁷ *Id.*, p. 27, ¶¶ 15-17.

dispute, but also for other purposes as well, including Ecuador's relationship with the United States. In that regard, he opines that the

‘rights, questions or facts’ that constitute Ecuador’s ‘claim for relief’ have all been put at issue and resolved. While Ecuador is dissatisfied with the outcome of that proceeding, it cannot claim that it has not had its day in court to litigate precisely the legal situation that gives rise to this attempt to initiate an Article VII arbitration.

Professor Reisman therefore states that *res judicata* applies to this inter-state arbitration even though that principle ordinarily imposes an “identity-of-parties requirement.” In other words, the United States (and Professor Reisman) are of the view that the *Chevron* interpretation of Article II(7) controls the interpretation of that provision not just for purposes of the *Chevron* dispute, but for Ecuador’s obligations vis-à-vis the United States as well. Ecuador disagrees with that assertion; it accepts that the Partial Award’s interpretation is final and binding *for the Chevron dispute*, but it rejects the claim that it has any wider application, including with respect to its obligations to the United States.⁸⁸ By advancing the position that *Chevron*’s interpretation of Article II(7) is not restricted to that arbitration, the United States has placed itself in positive opposition to Ecuador.

72. Further, even if these statements are disregarded, the United States has still articulated -- expressly -- its dispute with Ecuador. In that regard, the United States’ position, as reflected by its refusal to respond to Ecuador’s request for its interpretation, suggests, at the very least, that

⁸⁸ This is not the only place where the United States states that the *Chevron* interpretation is sacrosanct for purposes other than that dispute. For example, the Statement of Defense asserts that Ecuador improperly “seeks to compel the United States to *re-arbitrate the meaning* of Article II(7).” Similarly, the Memorial asserts that Ecuador is attempting to “revisit” the interpretation of Article II(7). These statements are irreconcilable with Ecuador’s position that, although the *Chevron* Partial Award is final and binding with respect to those parties and for purposes of that dispute, it does *not* control the interpretation of Article II(7) going forward or in relation to Ecuador and the United States’ obligations to each other.

the interpretation given by the *Chevron* tribunal may be correct. That view is irreconcilable with Ecuador's position that the Partial Award's interpretation of Article II(7) is erroneous. The logical irreconcilability of the United States' position with Ecuador's, by itself, demonstrates that a dispute exists.

2. The United States' Positive Opposition Can Be Also Inferred.

73. In addition to being able to objectively determine the existence of a dispute from the United States' express statements, the tribunal can also ascertain that a dispute exists by inference.⁸⁹ In that regard, this is not the first time that a Respondent has sought to avoid compulsory dispute settlement procedures by attempting to avoid express acknowledgment of a dispute. But international jurisprudence has developed a cogent principle to deal with such tactics: the existence of a dispute can be inferred, even if a State does not expressly acknowledge it.

74. As an initial matter, the United States contests that a dispute can be determined by inference, arguing that it can only be found to have a dispute with Ecuador if it expresses "positive opposition" to Ecuador's interpretation of Article II.⁹⁰ The United States is wrong: international law is clear that the existence of a dispute does not depend upon one party's express disagreement with, or positive opposition to, another's views. To the contrary, although express opposition may confirm the existence of a dispute, it is not an indispensable prerequisite to it. Instead, as the Court ruled in *Cameroon v. Nigeria*, "a disagreement on a point of law or fact, a

⁸⁹ *Cameroon v. Nigeria*, ¶ 89 (C-128); *Georgia v. Russia*, ¶ 30 (C-122).

⁹⁰ Memorial on Jurisdiction, p. 29-30; A. Zimmerman *et al.*, THE STATUTE OF THE INTERNATIONAL COURT OF JUSTICE (2006) (C-143) ("Zimmerman").

conflict of legal views or interests, or the positive opposition of the claim of one party by the other *need not necessarily be stated expressis verbis.*⁹¹ To the contrary, “[i]n the determination of the existence of a dispute … *the position or the attitude of a party can be established by inference, whatever the professed view of that party.*⁹² Thus, as the ICJ held in the *Certain Property* case, the inquiry into whether a party’s claim “is positively opposed by the other” is undertaken only “for the purposes of *verifying* the existence of a legal dispute.”⁹³ It is not a necessary precondition for it.⁹⁴

a. International Jurisprudence Permits Inference of a Dispute in this Case

75. The United States’ refusal to address the interpretation of Article II(7) does not shield it from a finding that there is a dispute over the interpretation of that provision. To the contrary, it is compelling evidence that a dispute, in fact, exists. That is because international law is clear that, as the ICJ recently held in *Georgia v. Russia*, “the existence of a dispute may be inferred from the failure of a State to respond to a claim in circumstances where a response is called for.”⁹⁵

76. This is not a new rule. The *locus classicus* of the principle is the ICJ’s Judgment in *Cameroon v. Nigeria*, a case that the United States’ Memorial treats with considerable

⁹¹ *Cameroon v. Nigeria*, ¶ 89 (C-128).

⁹² *Id.*

⁹³ *Liechtenstein v. Germany*, ¶ 24 (C-124).

⁹⁴ *Liechtenstein v. Germany*, ¶ 24. The same proposition was reiterated by the Court in the *East Timor* case. *Portugal v. Australia*, ¶ 22 (C-125).

⁹⁵ *Georgia v. Russia*, ¶ 30 (C-122).

circumspection. There, the Court was seized by Cameroon’s application requesting that it determine the entire boundary with Nigeria. Nigeria, however, asserted that there was no dispute in regards to “boundary delimitation as such.”⁹⁶ The Court refused to accept Nigeria’s denial of a dispute at face value; instead, it inquired into Nigeria’s underlying attitude. Having observed that Nigeria had not explicitly challenged the location of the boundary with Cameroon, the Court took note that “Nigeria has constantly been reserved in the manner in which it has presented its own position on the matter.”⁹⁷ The Court’s skepticism about Nigeria’s claim that there was no dispute was accentuated because Nigeria had “repeated, and has not gone beyond, the statement that there is no dispute concerning “boundary delimitation” even though Nigeria “knew about Cameroon’s preoccupation and concerns.”⁹⁸ These facts supported the inference that the parties were in dispute.

77. The Court’s conclusion that a dispute could be inferred was fortified by the fact that Nigeria failed to give a meaningful response when asked whether its “assertion that there is no dispute as regards the land boundary between the two States” meant that Nigeria agreed with Cameroon’s position regarding the boundary’s location (putting aside several discrete segments where there was unquestionably a dispute).⁹⁹ The Court observed that Nigeria’s reply failed to

⁹⁶ *Cameroon v. Nigeria*, ¶ 91 (C-128).

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Id.* ¶ 85. Specifically, the Court asked whether “there [wa]s agreement between Nigeria and Cameroon on the geographical co-ordinates of this boundary as they result from the texts relied on by Cameroon...”⁹⁹

“indicate whether or not it agrees with Cameroon on the course of the boundary or on its legal basis.”¹⁰⁰

78. In this situation, Nigeria’s reticence on the subject-matter of Cameroon’s Application permitted the Court to infer that a dispute did, in fact, exist. As the Court explained, it had been “seized with the submission of Cameroon which aims at a definitive determination of its boundary with Nigeria from Lake Chad to the sea.” Nigeria, on the other hand, “maintains that there is no dispute concerning the delimitation of that boundary as such throughout its whole length,” and that “Cameroon’s request definitively to determine that boundary is not admissible in the absence of such a dispute.” In these circumstances, a dispute could be said to exist because:

Nigeria has not indicated its agreement with Cameroon on the course of that boundary or on its legal basis ... and it has not informed the Court of the position which it will take in the future on Cameroon’s claims. Nigeria is entitled not to advance arguments that it considers are for the merits at the present stage of the proceedings; in the circumstances however, the Court finds itself in a situation in which it cannot decline to examine the submission of Cameroon on the ground that there is no dispute between the two States.¹⁰¹

79. The United States’ attempt to distinguish *Cameroon v. Nigeria* fails. It argues that Nigeria’s silence only justified the inference of a dispute because it was coupled with *actions*

¹⁰⁰ *Id.* ¶ 92.

¹⁰¹ *Id.* ¶ 93.

manifesting that dispute, namely, a disagreement with Cameroon’s claim to certain territories straddling the border and a number of cross-border incursions.¹⁰²

80. The United States is wrong. This was *not* what permitted the Court to determine that a dispute existed. Although it is true that Nigeria claimed certain disputed territories and its troops had engaged in cross-border incursions, these concerned only *small segments* of the boundary. They were, the ICJ explained, irrelevant to the core jurisdictional question, which was whether the parties were in dispute regarding the *entire* course of the boundary. What the ICJ said (and what the United States did not quote in its Memorial) is that “given the great length of that boundary,” it “cannot be said that these disputes in themselves concern so large a portion of the boundary that they would necessarily constitute a dispute concerning the whole of the boundary.”¹⁰³ Moreover, the Court explained, “not every boundary incident implies a challenge to the boundary.” Consequently, “even taken together with the existing boundary disputes, the incidents and incursions reported by Cameroon do not establish by themselves the existence of a dispute concerning all of the boundary between Cameroon and Nigeria.”¹⁰⁴

81. In other words, the Court specifically disclaimed reliance on the very facts that the United States invokes to try to distinguish *Cameroon v. Nigeria* from the situation present here. Thus, contrary to the United States’ characterization of the case, the Court ruled that there was a dispute *despite* the border incursions and minor territorial disputes, not because of them. To the contrary, what *did* permit the Court to infer that the entire boundary was in dispute was Nigeria’s

¹⁰² Memorial on Jurisdiction, p. 33.

¹⁰³ *Cameroon v. Nigeria*, ¶ 88 (C-128).

¹⁰⁴ *Id.* ¶ 90.

silence in the face of “Cameroon’s preoccupation and concerns” and its failure to respond meaningfully to a request for its position on the subject-matter of Cameroon’s Application.¹⁰⁵

82. Indeed, this is not the first time that the United States has contested the existence of a dispute on the ground that it has not expressly acknowledged that a dispute exists. The United States made the same argument in the *Headquarters Agreement* advisory opinion. There, the United Nations Secretary-General expressed the view that “a dispute within the meaning” of the Headquarters Agreement existed “between the United Nations and the United States” in relation to the ability of the PLO Observer Mission to the United Nations to maintain an office in the United States.¹⁰⁶ The United States, however, argued that there was no dispute because it had not “expressly contradicted the views expounded by the Secretary General” and because “in its public statements [it] has not referred to the matter as a ‘dispute.’”¹⁰⁷ The ICJ rejected these arguments, and found there was a dispute even though the United States had not expressly acknowledged it.¹⁰⁸

83. The United States’ attempt to distinguish this case fails as well. In particular, the United States suggests that it is inapposite because it involved an alleged breach of treaty obligations.¹⁰⁹ But the Court in that case made clear that a claim for breach is *not* a prerequisite for finding there is a dispute. It held that “a dispute may arise even if the party in question gives an assurance that

¹⁰⁵ *Id.* ¶ 91.

¹⁰⁶ *Applicability of the Obligation to Arbitrate Under Section 21 of the United Nations Headquarters Agreements of 26 June 1947*, Advisory Opinion (26 Apr. 1998), I.C.J. Reports 1988, ¶ 36 (C-117).

¹⁰⁷ *Id.* ¶ 37-39.

¹⁰⁸ *Id.* ¶ 42-44.

¹⁰⁹ Memorial on Jurisdiction, pp. 31-32.

no measure of execution will be taken” which would place it in breach of its international obligations.¹¹⁰ In other words, the Court’s finding of a dispute was not contingent upon an allegation that the treaty in question had been breached; to the contrary, it ruled there was a dispute even though no breach had occurred.

84. The United States fares no better in its attempt to distinguish *Georgia v. Russia*, which, as described above, held that a dispute can be inferred where a State fails to respond when a response is appropriate. In that regard, the United States asserts that the Court’s discussion regarding the definition of a dispute is not applicable here because in that case Russia’s positive opposition was found to have been manifest expressly. The United States’ argument is misplaced. It is true that, on the facts, the Court held that Russia’s statements denying allegations of ethnic cleansing demonstrated a dispute. But that is beside the point. The Court’s factual determination was not germane to its explanation of the general rule that the existence of a dispute may be inferred from the failure of a State to respond “in circumstances where a response is called for.”¹¹¹ The United States’ failure to respond justifies inferring there is a dispute.

85. As described *supra* in Section II, Ecuador conveyed to the United States its concerns regarding the interpretation of Article II(7) that was given by the *Chevron* tribunal, and explained how that tribunal’s interpretation differed from Ecuador’s own, which Ecuador had always understood to be the shared intention of the Parties when concluding the Treaty. Ecuador

¹¹⁰ *Applicability of the Obligation to Arbitrate Under Section 21 of the United Nations Headquarters Agreements of 26 June 1947*, ¶ 42 (C-117).

¹¹¹ *Georgia v. Russia*, ¶ 30 (C-122).

therefore asked whether the United States agreed with Ecuador's view. The United States' failure to respond to Ecuador's request gives rise to the inference that the Parties are in dispute.

86. This is, as the ICJ's case law makes clear, a paradigmatic example of a situation where, in the words of *Georgia v. Russia*, "a response is called for," and thus where "a dispute may be inferred from the failure of a State to respond."¹¹² In that regard, in analyzing what circumstances warrant a response, the ICJ held that this would be the case if the parties engaged in "exchanges" that "refer[red] to the subject-matter of the treaty with sufficient clarity to enable the State against which a claim is made to identify that there is, or may be, a dispute with regard to that subject-matter."¹¹³ Further, the Court explained that, although not required, "[a]n express specification would remove any doubt about one State's understanding of the subject-matter in issue and put the other on notice."¹¹⁴ Where, having been presented with such a request, a State fails to respond, a dispute can be said to exist.¹¹⁵

87. Here, it is beyond question that Ecuador satisfies this standard. In its diplomatic note of 8 June 2010, Ecuador described with great specificity the subject-matter of its concerns. Indeed, it could not have been more precise. The United States could not have misapprehended that Ecuador sought its interpretation of Article II(7); yet, it failed to provide a response, despite having clarity regarding the nature and importance of Ecuador's request.

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ *Id.*

88. The similarity to the situation presented in *Cameroon v. Nigeria* is striking. The United States, like Nigeria, argues that no dispute exists because it has remained silent about the matter. But just as the ICJ refused to allow Nigeria’s silence to allow it to avoid the Court’s jurisdiction on the grounds of a lack of a dispute, this tribunal is also entitled to conclude from the United States’ silence about Article II(7) that a dispute exists. As in *Cameroon v. Nigeria*, the fact that the United States has refused to provide its interpretation of Article II(7) despite having been apprised of Ecuador’s “preoccupations and concerns” about its meaning, is, in itself, a compelling reason to infer that there is a dispute. Indeed, that conclusion is even more warranted here because the United States did not just respond with silence, it culminated its silence by informing Ecuador that no response would be given. As Professor Pellet states, “I have no difficulty to accept that” this “situation is one w[h]ere an issue was raised by one Party to a treaty calling for a response ...”¹¹⁶ Indeed, the circumstances of Ecuador’s request for the United States’ interpretation of Article II(7) made a response especially called for. Consequently, its failure to respond creates a particularly strong inference of a dispute.

89. In that regard, a response from the United States was especially warranted because the interpretation of Article II(7) that was given by the arbitral tribunal in *Chevron* introduced tremendous uncertainty in connection with the nature and scope of Ecuador’s obligations thereunder. On the one hand, Ecuador had always understood Article II(7) to reflect the Contracting Parties’ obligations under customary international law, an interpretation which Ecuador had considered to be both mutually held and faithful to the Contracting Parties’ intentions when concluding the Treaty. On the other, the *Chevron* tribunal had interpreted

¹¹⁶ Pellet Opinion, ¶ 25.

Article II(7) as a *lex specialis* rule imposing obligations that go beyond customary international law.

90. Having been alerted to this discrepancy, a response by the United States was called for. The interpretation given to Article II(7) by the *Chevron* tribunal is not only irreconcilable with the interpretation given by another arbitral tribunal in *Duke Energy v. Ecuador*, it also departs from Ecuador's longstanding understanding of that provision. Thus, the uncertainty confronting Ecuador regarding the nature of its obligations under Article II(7) stemmed not only from its own disagreement with the Partial Award in *Chevron*, but also from the fact that another tribunal, interpreting the same Article, came to a strikingly different conclusion than did *Chevron*.

91. Absent clarification of Ecuador's obligations under Article II(7), Ecuador risks incurring significant financial liability unless, out of an abundance of caution, it implements the *lex specialis* rule described by *Chevron* despite Ecuador's conviction that that interpretation is erroneous. In other words, the effect of the uncertainty over the proper interpretation of Article II(7) is that Ecuador may be *de facto* forced to act in conformity with the *Chevron* interpretation, despite its disagreement with it. Ecuador has a justified and compelling need to clarify what the nature of its obligation under Article II(7) are in order to arrange its affairs to be in compliance with that obligation.

92. In these circumstances, the United States' acquiescence to this situation is inconsistent with its fundamental duty to perform the Treaty in good faith. The principle of good faith, specifically related to the performance of treaty obligations under the notion of *pacta sunt*

servanda,¹¹⁷ requires that the U.S. take *active* steps to fulfill the object and purpose of the Treaty.

As the Iran-U.S. Claims Tribunal stated in Case No. A21:

the act of entering into a treaty in good faith carries with it the obligation to fulfil [*sic*] the object and purpose of that treaty -- in other words, *to take steps to ensure its effectiveness*.¹¹⁸

93. This is especially relevant here because the United States' inaction is inconsistent with one of the Parties' cooperative objectives under the Treaty, expressed in its Preamble, to stimulate the flow of private capital and their economic development through their "agreement" upon the treatment to be accorded to the investments of the other Party. That is not to say that the United States had an obligation to agree with Ecuador's position; rather, at the very least, it suggests that the failure of the United States to respond creates an especially strong inference of a dispute.

94. The United States' attitude conflicts with the principle of good faith in another respect as well. As Professor Cheng has explained, the principle of good faith "prohibits a party from exacting from the other party advantages which go beyond their common and reasonable intention at the time of the conclusion of the treaty."¹¹⁹ Judge Fitzmaurice made a similar point

¹¹⁷ Vienna Convention on the Law of Treaties (23 May 1969), 1155 U.N.T.S. 331, art. 26 (C-153) ("VCLT"). The United States contends that "Ecuador cannot rely on *pacta sunt servanda* to forge an obligation requiring the United States to interpret the Treaty to prevent any misinterpretation and misapplication of the BIT that results in harm to Ecuador." This view, however, is contrary to the fundamental principle of *pacta sunt servanda*, which mandates that "every treaty in force is binding upon the parties to it and *must be performed by them in good faith*." VCLT, Article 26. *Pacta sunt servanda* does not have an "abstract" value. It derives "from changing factors capable of altering the substantive content of the international regime." Thus, "*good faith may come into play at every stage as it follows the fate of the rule, from its formation and performance to its termination*." O. Corten and P. Klein, THE VIENNA CONVENTION ON THE LAW OF TREATIES: A COMMENTARY, Vol. I (2011), p. 668 (C-143) ("VCLT: A COMMENTARY")

¹¹⁸ *The Islamic Republic of Iran v. The United States of America*, Iran-U.S. Claims Tribunal, Case No. A21, Decision No. DEC. 62-A21-FT (4 May 1987), ¶ 14 (C-142) (emphasis added).

¹¹⁹ B. Cheng, GENERAL PRINCIPLES OF LAW AS APPLIED BY COURTS AND TRIBUNALS (2006), p. 118 (C-119) ("Cheng"). See also L. McNair, THE LAW OF TREATIES (1961) (C-140) at p. 465:

when he stated that carrying out a treaty in good faith requires a party “to give it a reasonable and equitable effect according to the correct interpretation of its terms.”¹²⁰

95. Applied to this context, implementation of the duty of good faith called for the United States to make reasonable efforts to ensure that Article II(7) is interpreted and applied correctly. Because United States investors under the Treaty are “permitted for convenience to enforce what are in origin the rights of Party states,”¹²¹ the principle of good faith militates against the United States withholding its position on the interpretation of Article II(7) when doing so, in effect, forces Ecuador to accord to United States investors advantages that may exceed those they are entitled to under that Article.

96. That the situation presented to the United States called for a response is underscored by the provision in Article V of the Treaty that admonishes the parties to consult on matters of interpretation of the provisions of the Treaty. The inference of a dispute is *even stronger* because, in the framework of the Treaty, the Contracting Parties thereby expressly reaffirmed their commitment to discuss matters relating to the interpretation or application of the Treaty. Because the United States conclusively ended dialogue about the interpretation of Article II(7), the tribunal is entitled to make an especially strong inference that a dispute exists.

The performance of treaties is subject to an over-riding obligation of mutual good faith. This obligation is also operative in the sphere of the interpretation of treaties, and it would be a breach of this obligation for a party to make use of an ambiguity in order to put forward an interpretation which it was known to the negotiators of the treaty not to be the intention of the parties.

¹²⁰ VCLT: A COMMENTARY, p.678 (C-143).

¹²¹ *The Loewen Group, Inc. and Raymond L. Loewen v. United States of America*, ICSID Case No. ARB(AF)/98/3, Award (26 Jun. 2003) (Mason, Mikva, Mustill), ¶ 233 (C-95).

97. In short, upon receipt of Ecuador's Note, the United States faced a circumstance that in good faith called for a response indicating its interpretation or at least informing Ecuador that it does not share the proposed interpretation and consented to discuss that matter meaningfully. Such a meaningful response is consistent with the purpose of the principle of good faith: to promote trust and confidence whereby "everyone has the right not to be disappointed *in the legitimate expectations which he entertained concerning the development of a legal relationship in which he is a partner.*"¹²² As the ICJ stated in the *Nuclear Tests* case:

"[o]ne of the basic principles governing the creation and performance of legal obligations, whatever their source, is the principle of *good faith*. Trust and confidence are inherent in international co-operation, in particular in an age when this co-operation in many fields is becoming increasingly essential."¹²³

98. The principle of good faith in a treaty relationship thus serves to ensure trust and confidence and creates legitimate expectations concerning the development of legal relationship between the parties. The U.S. failure to respond meaningfully disappoints Ecuador in the legitimate expectations to receive such a response and thus gives rise to a legitimate inference that the United States disagrees with Ecuador on the interpretation of Article II(7).

99. The United States' arguments on this point are inadequate. Although the U.S. relies on *Cameroon v. Nigeria* for the proposition that absent a specific treaty obligation, a State "may not justifiably rely upon the principle of good faith" to support a claim,¹²⁴ that case furnishes no

¹²² E. Kaufmann, *Règles générales du droit de la paix*, RCADI, IV, vol. 54 (1935), pp. 510-511 (C-131).

¹²³ *New Zealand v. France*, ¶ 49 (R-60).

¹²⁴ Memorial on Jurisdiction, pp. 39-40.

support for the U.S. argument that “Ecuador cannot rely on the principle of good faith to create an international obligation where none exists.”¹²⁵ In *Cameroon v. Nigeria*, the Court dealt with a completely different question: whether a State subscribing to the Optional Clause and filing an application shortly thereafter had an obligation to inform a prospective respondent. Specifically, Nigeria argued that Cameroon “omitted to inform it that it intended to accept the jurisdiction of the Court, then that it had accepted that jurisdiction and, lastly, that it intended to file an application” to institute proceedings before the Court.¹²⁶ That omission, according to Nigeria, breached the principle of good faith.¹²⁷ The Court barred Nigeria from relying on the principle of good faith because “there is no specific obligation in international law for States to inform other States parties to the Statute that they intend to subscribe or have subscribed to the Optional Clause,” nor to inform of their “intention to bring proceedings before the Court.”¹²⁸ Ecuador’s invocation of the principle of good faith bears no resemblance to Nigeria’s.

100. Nor can the United States maintain that a response was any less called for because of any of the litany of excuses it cites. For example, it is hard to see how a report that Ecuador had “[t]erminated its BIT with Finland” or had “[t]asked a Special Commission to review each of its 23 BITs” is remotely relevant. Moreover, whatever domestic measures Ecuador might have undertaken or considered taking, they do not affect its obligations on the international plane.¹²⁹

¹²⁵ *Id.*

¹²⁶ *Cameroon v. Nigeria*, ¶ 36 (C-128).

¹²⁷ *Id.*

¹²⁸ *Id.* ¶ 39.

¹²⁹ *Case of the Free Zones of Upper Savoy and the District of Gex (Second Phase)*, Order of Dec. 6, 1930, PCIJ, Ser. A, No. 24, p. 12 (C-144)

Regardless, the Treaty was -- and is -- still in force, and under Article XII, even if terminated, will continue to protect United States investors for another 10 years.¹³⁰

101. Lastly, the U.S. contends that it has discretion not to express its position on the meaning of Article II(7).¹³¹ But under international law any discretion is also subject to the principle of good faith. This means that discretion “must be exercised *reasonably, honestly*, in conformity with the spirit of the law and *with due regard to the interests of the other.*”¹³² Thus, while the United States retains the ability not to give an interpretation, it cannot in good faith seek to avoid the implications of such a choice, namely, here, the inference that a dispute exists.

C. No Proper Ground Has Been Asserted For The Tribunal To Decline The Exercise Of Its Contentious Jurisdiction Over Ecuador’s Request

102. Having failed to demonstrate either that Ecuador’s claim lacks necessary concreteness or that there is no justiciable dispute between the Parties, the United States attempts to divert the Tribunal’s focus away from the actual legal issues pertaining to its jurisdiction toward what can only be seen as red herrings, irrelevancies and mischaracterizations. Each of these diversions is rebutted below, in turn.

1. Ecuador’s Request For The Resolution Of A Dispute Concerning The Interpretation Of Article II(7) Does Not Invite The Exercise Of Appellate, Referral or Advisory Jurisdiction

¹³⁰ Ecuador-U.S. BIT, Art. XII(3) (“With respect to investments made or acquired prior to the date of termination of this Treaty and to which this Treaty otherwise applies, the provisions of all of the other Articles of this Treaty shall thereafter continue to be effective for a further period of ten years from such date of termination.”).

¹³¹ MJ, pp. 44-45.

¹³² B. Cheng, GENERAL PRINCIPLES OF LAW AS APPLIED BY COURTS AND TRIBUNALS (2006), pp. 133-134 (C-119).

103. The United States attempts to mischaracterize Ecuador's claim as seeking the exercise of appellate, referral and/or advisory jurisdiction. But these attempted analogies are inapposite and do not accurately capture what this claim is about, that is, a request for the resolution of a dispute concerning the interpretation and application of Article II(7) of the Treaty.

104. *First*, Ecuador is not using this arbitration as an “appeal” of the Partial Award in *Chevron*. The jurisdiction invoked by Ecuador in this case simply does not bear any of the hallmarks of what is considered to be an “appeal.” And the fact that Ecuador takes issue in this State-to-State interpretive dispute with the interpretation of Article II(7) expressed in the Partial Award does not somehow convert Ecuador’s claim into an appeal of that award.

105. The proceedings contemplated by Article VII of the Treaty are very different from an “appeal,” which is “[a] proceeding undertaken to have a decision reconsidered by a higher authority; esp. the submission of a lower court’s or agency’s decision to a higher court for review and possible reversal.”¹³³ Thus, an appeal, by definition, concerns a mechanism by which a superior court reviews, and has the opportunity to reverse or modify, a ruling by a subordinate court, with binding effect *on that lower court decision*. That is an impossibility here. To be sure, Ecuador disagrees with the interpretation given to Article II(7) by the *Chevron* tribunal, but Ecuador fully accepts that that award is final and binding, subject only to the procedures available to it under the relevant municipal law. An award by this tribunal cannot disturb that award’s final and binding character. As much as Ecuador disagrees with the Partial Award, Ecuador recognizes that this Article VII tribunal cannot change the legal effects of that award.

¹³³ B.A. Garner, BLACK’S LAW DICTIONARY (9th edition, 2009), p. 112 (C-120) (“Garner”)

106. The United States' assertion that public statements by the Ecuadorian government suggests an intention to use the Article VII procedure as an appeal is baseless. Leaving aside the fact that statements by the Ecuadorian government cannot transform an inter-state arbitration into an "appeal" of an investor-State award, the Ecuadorian government has never expressed that desire. In the statement cited by the United States, the Ecuadorian government said only that the inter-State arbitration is consistent with the overall goal of "avoiding the generation of an ominous precedent for Ecuador" being pursued in the District Court in The Hague. The statement thus does not betray a hidden agenda to use this arbitration to somehow overturn the *Chevron* decision; rather, it merely notes consistency of this proceeding with Ecuador's efforts under Dutch law to challenge the Partial Award.

107. Moreover, the statement goes on, in a passage not quoted by the United States, to elaborate on Ecuador's motivation for commencing this arbitration:

This process that has been presented by the Office of the Attorney General of Ecuador, is aligned with the International Law, and with the terms of the Bilateral Investments Treaty. Its only intentions are to find a legitimate solution in regards to the problems of interpretation of the BIT, and to guarantee proper judicial protection to the Republic of Ecuador, and to avoid future legal claims that could harm Ecuador.¹³⁴

¹³⁴ Translation of Respondent: Press Release of the Ecuadorian Office of the Attorney General dated July 4, 2011 (C-146) ("Este proceso que ha emprendido la Procuraduría General del Estado, enmarcado en el respeto al derecho internacional y al propio Tratado Bilateral de Inversiones suscrito con los Estados Unidos, tiene como finalidad exclusiva encontrar una solución legítima a un problema de interpretación del TBI, además de garantizar la seguridad jurídica de la República y evitar así futuras demandas o acciones legales que puedan perjudicar al Ecuador.") (R-112) The Respondent reference to a presentation by the Procurador General del Estado Dr. Diego García Carrión, which compares the standard for a denial of justice under international law and the *Chevron* II tribunal's interpretation of the "effective means" provision, is without relevance. The presentation only reference to the inter-state arbitration is the three questions on the interpretation of Article II(7) posed by Ecuador. See, PowerPoint Presentation of the Ecuadorian Office of the Attorney General (R-113).

108. In other words, Ecuador invokes Article VII for precisely the purposes for which it is intended: to resolve disputes over the interpretation of the Treaty. As the statement makes clear, this is so that Ecuador can be confident it is complying with its Treaty obligations and not exposed to *future* liability.

109. The United States' assertion that an Article VII tribunal has no "referral jurisdiction" is as misplaced as it is inaccurate. Referral jurisdiction refers to a procedure under which one court is empowered to refer a legal question to a coordinate court for resolution, and once answered, for later use in the underlying proceeding. It has thus been defined as "[t]he act or an instance of sending or directing to another for information, service, consideration, or decision."¹³⁵

110. Article 267 of the Treaty on the Functioning of the European Union provides an example. It allows a national court of the EU to request that the European Court of Justice answer questions concerning EU law, which the referring court can then use. A national court will suspend a case until the ECJ has delivered its decision.

111. This arbitration cannot be an exercise of referral jurisdiction because an essential prerequisite is missing: a court has not referred a question to this tribunal for use in another proceeding. Indeed, no such referral could be made in regards to the *Chevron* arbitration, even theoretically, because that proceeding has concluded. Its Final Award was rendered on August 30, 2011, and the tribunal's mandate terminated thirty days thereafter upon the expiration of the period for correction/revision/additional award. Indeed, now, not only has the *Chevron* arbitration concluded, so too has the court proceeding before the District Court in The Hague in

¹³⁵ Garner, p. 1394 (C-120).

which Ecuador sought to annul the Partial Award. That proceeding ended on May 2, 2012 when the District Court issued its Judgment denying Ecuador's request. Moreover, even if that decision is appealed, there is no suggestion that the appeals court has authority to refer any question to an arbitral tribunal created under the Treaty. Consequently, there can be no question of referral jurisdiction here, for the simple reason that there is no coordinate tribunal.

112. Finally, this arbitration is not -- and cannot be -- an exercise of advisory jurisdiction.¹³⁶ Advisory jurisdiction involves the provision of legal advice to organs or institutions that have requested such opinions.¹³⁷ Unlike exercises of contentious jurisdiction, advisory opinions are not binding and thus, are not a means of settling disputes.¹³⁸ Here, for all the reasons set forth above, the United States and Ecuador are in dispute regarding the interpretation of Article II(7). The award that will be made by this tribunal will be binding upon them. It will not provide non-binding advice.

2. The Interpretation Of Article II(7) By The Tribunal In This Case Does Not Constitute Judicial Law-Making

113. The United States further argues that exercising jurisdiction over Ecuador's request for an interpretation of Article II(7) would exceed the judicial function of the Tribunal under Article VII of the Treaty.¹³⁹ This U.S. argument is also premised on the notion that Article VII somehow does not empower the Tribunal to decide the Parties' dispute regarding the

¹³⁶ Memorial on Jurisdiction, p. 49.

¹³⁷ H. Mosler and K. Oellers-Frahm, *Article 96* [in:] B. Simma *et al.*, THE CHARTER OF THE UNITED NATIONS: A COMMENTARY (2nd edition, Vol. II) (2002), p. 1186 (C-133).

¹³⁸ Hugh Thirlway, *Advisory Opinions*, MAX PLANCK'S ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW (April 2006) (C-135).

¹³⁹ Memorial on Jurisdiction, p. 55.

interpretation of Article VII in the circumstances of this case. Therefore, the exercise of jurisdiction by the Tribunal in this case would amount to “author[ing] new rules” in order to find jurisdiction.”¹⁴⁰ This argument is without merit.

114. The clarification of the *content* of Articles II(7) and VII, as opposed to the act of their *creation*, is independent from States’ consent;¹⁴¹ therefore there can be no question of judicial law-making in this case.¹⁴²

115. Much like with its reliance on the *Dual Nationality* case, whose idiosyncratic jurisdictional foundation renders it inapposite for this case,¹⁴³ the United States’ reliance on the separate opinion of Judge Gros in the *Nuclear Tests* case and on the *Aminoil* award is similarly misplaced.

116. The U.S. quotes the words of Judge Gros to illustrate what it calls the “perils of [a tribunal] performing the legislative function.”¹⁴⁴ Yet, an examination of the context in which the words of the Judge were offered reveals the inappropriateness of the U.S. analogy. Judge Gros considered that there was no rule of international law that could be opposed to the French

¹⁴⁰ *Id.*

¹⁴¹ A. Orakhelashvili, THE INTERPRETATION OF ACTS AND RULES IN PUBLIC INTERNATIONAL LAW (2008), p. 286 (C-113) (“Orakhelashvili”)

¹⁴² Indeed, the United States itself acknowledges the difference between the interpretation of existing law and the creation of new rules. Memorial on Jurisdiction, p. 55.

¹⁴³ McCaffrey Opinion, para. 31-34.

¹⁴⁴ Memorial on Jurisdiction, p. 56.

Government for the purpose of obtaining the requested relief from France;¹⁴⁵ moreover, the General Act of Geneva, the jurisdictional foundation of Australia's application, had fallen into desuetude.¹⁴⁶ In these circumstances, where Judge Gros found both the absence of a legal right and of a valid cause of action, the exercise of jurisdiction by the ICJ would indeed be tantamount to usurping the legislative function from States. By contrast, this case implicates the interpretation and application of existing rules of law; moreover, the legal validity of Article VII is not disputed.

117. The U.S.'s reliance on *Aminoil* is similarly misplaced. Ecuador is not seeking an equitable revision of Article II(7) or Article VII, as was sought there. These provisions are not an "incomplete contract;" Article VII in particular is a "widely drawn" clause which entirely covers Ecuador's claims in the present case.¹⁴⁷ The admonition of Professor Baptista rings particularly true in this respect: "the interpreter does not have the right to say ... *less* than what is said in the text he is interpreting ..." ¹⁴⁸

118. In sum, Ecuador does not ask the Tribunal to create a new rule of international law empowering it to exercise jurisdiction over Ecuador's request. Nor does Ecuador ask the Tribunal to substitute Article II(7) for a new rule of international law. Rather, Ecuador asks that

¹⁴⁵ Separate Opinion of Judge Gros, *Nuclear Test Case (Australia v. France)*, I.C.J. Rep. 1974, 253, p. 288 (¶ 21) (citing Northern Cameroons, p. 37: "it is not the function of a court merely to provide a basis for political action if no question of actual legal rights is involved.") (R-77).

¹⁴⁶ *Id.* p. 297 (¶ 36) (noting: "[T]he cause of international adjudication has not been furthered by an attempt to impose the Court's jurisdiction, apparently for a formal reason, on States in whose eyes the General Act was, quite clearly, no longer a true yardstick of their acceptance of international jurisdiction.") (R-77).

¹⁴⁷ *In the Matter of an Arbitration between Kuwait and the American Independent Oil Company (AMINOIL)*, Award, Mar. 24, 1982, 21 I.L.M. 976, 1016 (R-53).

¹⁴⁸ L. O. Baptista, *Interpretation and Application of WTO Rules*, at p. 130 (R-91).

the Tribunal decide the proper interpretation of an *existing* rule of international law that is manifest in Article II(7) of the Treaty. In case of antimonies in the interpretation of an existing rule of law, it is *precisely* the judge's role to decide which among competing interpretations is proper.¹⁴⁹ As noted by Orakhelashvili, this particular task “is what distinguishes international lawyers from stamp collectors.”¹⁵⁰

3. This is Not a Political but a Legal Dispute

119. The United States asserts that “Article VII does not contemplate resolution of a political disagreement between the Parties about whether to interpret Article II(7).”¹⁵¹ But as Professor Tomuschat observes, “[b]y their very essence, disputes between States are permeated by political considerations.”¹⁵² Such considerations, however, do “not affect the legal character of the dispute.”¹⁵³ This has been also made clear by the ICJ in the *Border and Transborder Armed Actions Case*, where the Court held:

The Court is aware that political aspects may be present in any legal disputes brought before it. The Court, as a judicial organ, is however only concerned to establish, first, that the dispute before it is a legal dispute, in the sense of a dispute capable of being settled by the application of principles and rules of international law, and secondly, that the Court has jurisdiction to deal with it, and that that jurisdiction is not fettered by any circumstance rendering the application inadmissible.... (I)t cannot concern itself with the

¹⁴⁹ *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion (Dissenting Opinion of Judge Higgins), I.C.J. Rep 1996, p. 592 (¶ 40) (C-141).

¹⁵⁰ Orakhelashvili. p. 287 (C-113).

¹⁵¹ Memorial on Jurisdiction, p.18.

¹⁵² Zimmerman, p. 599 (C-143).

¹⁵³ C. F. Amerasinghe, JURISDICTION OF SPECIFIC INTERNATIONAL TRIBUNALS (2009), p.47. (C-145).

political motivation which may lead a State at a particular time, or in particular circumstances, to choose judicial settlement.¹⁵⁴

120. Here, as the ICJ held in the *Interhandel Case*, “the divergent views of the two Governments [are] concerned with a clearly defined legal question,”¹⁵⁵ namely the interpretation of Article II(7). The United States itself recognizes that Ecuador has invoked the jurisdiction of this Tribunal “to *adjudicate the legal questions.*”¹⁵⁶ Because these are questions that are “*capable of being settled by the application of principles and rules of international law,*” there is no doubt that the Tribunal is presented with a legal dispute over which it can exercise jurisdiction.

4. Ecuador Has Not Promulgated a Unilateral Interpretation

121. The United States further attempts to mischaracterize the proceedings by arguing that Ecuador is seeking unilaterally to impose an interpretation of Article II(7), asserting that Ecuador’s “diplomatic note is akin to a unilateral interpretative declaration.”¹⁵⁷ But, clearly, this

¹⁵⁴ *Border and Transborder Armed Actions Case (Nicaragua v Honduras)*, Judgment on Jurisdiction and Admissibility (1988), ICJ Reports 1988, p. 91 (R-62).

¹⁵⁵ *Interhandel Case (Switzerland v. United States of America)*, Judgment (Preliminary Objections) (21 Mar. 1959), I.C.J. Reports 1959, p. 6 *et seq.*, p. 21 (C-146).

¹⁵⁶ Memorial on Jurisdiction, p.53.

¹⁵⁷ *Id.* p. 41.

is not something that Ecuador can do under international law.¹⁵⁸ A unilateral declaration by definition only binds its author;¹⁵⁹ it has no effect on other parties.¹⁶⁰

122. In this case, Ecuador sought the United States' confirmation of its understanding of the common intentions of the Parties through the Diplomatic Note of June 8, 2010 and its subsequent efforts to discuss the matter with the United States. The United States, however, balked at Ecuador's invitation and, on October 4, 2010, flatly refused to respond in substance to Ecuador's interpretation of Article II(7). This left Ecuador with no choice but to seek an authoritative interpretation from this Tribunal. By no theory can this be considered as the imposition of a unilateral interpretation.

5. Exercise Of Jurisdiction By The Tribunal In This Case Would Be Consistent With The Treaty's Object And Purpose

123. In its effort to deflect the Tribunal from exercising its jurisdiction over Ecuador's request, the United States manufactures asserted inconsistencies with the Treaty's object and purpose. These considerations are erroneous, however, and should not detract the Tribunal from what is

¹⁵⁸ Under paragraph 1 of the ILC's *Guiding Principles applicable to unilateral declarations of States capable of creating legal obligations* (2006), a "unilateral declaration" is defined in paragraph 1 as:

"Declarations publicly made and manifesting the will to be bound may have the effect of creating legal obligations. When the conditions for this are met, the binding character of such declarations is based on good faith; States concerned may then take them into consideration and rely on them; such States are entitled to require that such obligations be respected" (C-136)

¹⁵⁹ *Id.* ¶ 4 ("A unilateral declaration binds the State internationally only if it is made by an authority vested with the power to do so. By virtue of their functions, heads of State, heads of Government and ministers for foreign affairs are competent to formulate such declarations. Other persons representing the State in specified areas may be authorized to bind it, through their declarations, in areas falling within their competence.")

¹⁶⁰ *Id.*, ¶ 9 ("No obligation may result for other States from the unilateral declaration of a State. However, the other State or States concerned may incur obligations in relation to such a unilateral declaration to the extent that they clearly accepted such a declaration")

its essential task: to interpret whether the requirements of Article VII have been met in the circumstances of this case.

124. First, the United States alleges that the exercise of jurisdiction in this case would undermine the stability, predictability and neutrality of the investor-State dispute settlement process under Article VI of the Treaty, in that it could be used for a collateral attack on the *Chevron* award.

125. As indicated above, the decision in this case has no effect on the *Chevron* award and does not amount to a re-litigation or appeal of that award.¹⁶¹ In fact, the U.S. argument is refuted by its own expert, Prof. Reisman, who states in his opinion that the Tribunal's decision on the interpretation of Article II(7) "would not affect the *Chevron*-*TexPet* award or the annulment procedure which Ecuador has initiated and is pending in the Netherlands, or any potential future enforcement action in national courts."¹⁶²

126. As such, the Tribunal's exercise of jurisdiction and decision on the scope of Article II(7) of the Treaty does not undermine the stability and predictability of the dispute settlement process under Article VI. Since there is no doctrine of precedent in international investment law, there is an enhanced danger that core substantive protections in international investment treaties are not decided coherently.¹⁶³ An authoritative interpretation of Article II(7) by the Tribunal would thus promote uniformity and stability of the law, thereby not only increasing certainty among

¹⁶¹ See Section II.

¹⁶² Opinion of Prof. Reisman, ¶ 52.

¹⁶³ A relevant example of this being the divergence of the *Duke Energy* and *Chevron* tribunals on the scope of Article II(7) of the Treaty

protected investors, but also enhancing the authority of arbitral awards rendered on the basis of Article VI.

127. Moreover, in no way would the exercise of jurisdiction by the Tribunal lead to a politicization of investment disputes under the Treaty. On the contrary, it will lead to less politicization since by clarifying the Parties' existing legal rights and obligations it would eliminate a potential point of friction, or, in the words of the ICJ in the *Northern Cameroons* case, "uncertainty from their legal relations."¹⁶⁴ The binding outcome of this process would even signify the Parties' "agreement upon treatment to be accorded to "investments of the other Party," which is believed to be conducive to the realization of the cooperative objectives of the Treaty.¹⁶⁵

6. Finding Jurisdiction Would In Fact Incentivize Parties To Consult

128. The United States further submits that the Tribunal should decline jurisdiction in this case because settlement of disputes concerning the interpretation and application of the Treaty under Article VII would "effectively judicialize significant aspects of [the Parties'] bilateral relationship." The U.S. argument goes on to assert that upholding jurisdiction would effectively shut down lines of communication between the Parties and hinder the exchange of views. It postulates that Parties would "approach with extreme caution every request for discussion" for fear that "any expression of disagreement, silence or even the mere failure to respond

¹⁶⁴ *Northern Cameroons*, p. 34 (C-129).

¹⁶⁵ Ecuador-U.S. Treaty, Preamble.

immediately to the other Party's assertion about the Treaty could land the Parties in State-to-State arbitration.”¹⁶⁶

129. The United States' concern about impeding communications is ironic in light of the fact that it was the United States that shut down communications concerning the interpretation of Article II(7). The State Department Legal Advisor abruptly and without explanation transmitted the position of the United States government not to respond to Ecuador's apprehension concerning the proper interpretation of that provision.¹⁶⁷

130. Whatever effect the existence of Article VII has upon the Parties' appreciation of their relations, it is a product of their mutual agreement to include the possibility of arbitration of interpretive disputes in the Treaty. They did so in the express understanding that such possibility coexists with the possibility of consultations.

131. This is clear in light of Article V of the Treaty. The Respondent seeks to draw a distinction between the use of the word “matter” for consultations under Article V and “disputes” submitted to the State-to-State arbitration pursuant to Article VII relating to the interpretation and application of the Treaty. From this, they draw the conclusion that “Article V is meant to foster discussion, not arbitration, of a wide range of issues concerning the interpretation or application of the Treaty, including abstract questions.”¹⁶⁸ This allegedly compartmentalizes the

¹⁶⁶ Memorial on Jurisdiction, p. 63.

¹⁶⁷ Witness Statement of Luis Benigno Gallegos, 23 May 2012, para. 8.

¹⁶⁸ *Id.*, p. 64.

narrow range of disputes that may be arbitrated from the broader economic and political “matters” that are subject to diplomatic discussions.¹⁶⁹

132. But these assertions wrongly assume that consultations and adjudication are two distinct mechanisms that operate in isolation of one another. This has been refuted by international courts and tribunals time and again. International law holds that negotiations and adjudication are not “two separate categories,” insulated from each other, but rather are complementary forms of dispute settlement that can be pursued simultaneously. As the ICJ stated in the *Aegean Sea Continental Shelf case*:

Negotiation and judicial settlement are enumerated together in Article 33 of the Charter of the United Nations as means for the peaceful settlement of disputes. The jurisprudence of the Court provides various examples of cases in which negotiations and recourse to judicial settlement have been pursued *pari passu*. Several cases, the most recent being that concerning the *Trial of Pakistani Prisoners of War* (I.C.J. Reports 1973, p. 347), show that judicial proceedings may be discontinued when such negotiations result in the settlement of the dispute. Consequently, the fact that negotiations are being actively pursued during the present proceedings is not, legally, any obstacle to the exercise by the Court of its judicial function.¹⁷⁰

133. Similarly, the tribunal in *Alps Finance* citing the views of a leading commentator on investment arbitration refused to treat these forms of dispute settlement as mutually exclusive: “*Negotiations remain possible while the arbitration proceedings are pending*.”¹⁷¹

¹⁶⁹ *Id.*, p. 65.

¹⁷⁰ *Aegean Sea Continental Shelf, (Greece v Turkey)*, Jurisdiction, Judgment (1978) I.C.J. Reports 1978, ¶ 29 (C-114).

¹⁷¹ *Alps Finance and Trade AG v. Slovakia*, UNCITRAL, Award (5 Mar. 2011), ¶ 204 (Stuber, Klein, Crivellaro) (C-115) citing to SCHREUER, *International Investment Law*, ed. by P. Muchlinski, F. Ortino e C. Schreuer, *Chapter 21: Consent to Arbitration*, Oxford University Press, 2008, p. 846.

134. Thus, the United States' attempt to suggest that the Parties may enter into consultations regarding abstract matters but not for dispute resolution under Article VII is unavailing. The use of the different words "matter" and "dispute" reflect the reality that, at the initial stage of consultations, the Parties have not yet determined whether a dispute exists. A dispute crystallizes when a Party expressly disagrees or whose refusal to respond signifies that Party's disagreement.

135. If Ecuador were somehow precluded on the basis of these assertions from submitting this dispute to arbitration, then there would be no need for international courts and tribunals to resolve disputes at all. No Party would be entitled to elect arbitration after a failure to resolve disputes through negotiations or consultations under the fear that such action would "chill" the dialogue with its Treaty partner. This is clearly not true as a general matter because of the proliferation of the State-to-State dispute settlement clauses in treaties. The existence of these clauses shows that States intended to provide recourse in the event that consultations did not resolve the issue.

7. Exercise of Jurisdiction Over Ecuador's Request Must be Decided Solely on the Basis of Article II of the Treaty

136. In previous sections of Ecuador's Memorial, it was explained that the Tribunal has authority under Article VII to exercise jurisdiction. The Tribunal must not be dissuaded from the reasonable exercise of its jurisdiction based on the extraneous non-legal considerations offered by the United States. In this regard, the United States seeks to inject panic into these proceedings by arguing that this case could "set a dangerous precedent for international law."¹⁷²

¹⁷² Memorial on Jurisdiction, p. 66.

Marshaling a parade of horribles, the United States claims that finding jurisdiction in this case could open the floodgates to State-to-State arbitration under a wide spectrum of treaties, it would chill discussions between States on the meaning of treaties and would threaten the finality of investor-state awards. These are, of course, wild exaggerations. The Respondent underestimates the diverse reasons a State may choose to arbitrate a dispute with its Treaty partner. Such a decision will not be entered into lightly.

137. Furthermore, the Respondent's argument is one of policy which should not factor into the Tribunal's deliberations. Orakhelashvili explains this rule: "If interpretation is meant to clarify the content of law that has crossed the threshold of legal regulation, it naturally follows that the process of interpretation has to be independent of non-legal considerations."¹⁷³ Citing to the *Certain Expenses* case, Orakhelashvili continues "interpretation is a purely legal, not political, task."¹⁷⁴ Thus, the Tribunal's role is simple to determine whether it has jurisdiction to hear this dispute without contamination from the political considerations mentioned.

III. RELIEF SOUGHT

138. For the foregoing reasons, the Republic of Ecuador respectfully requests that this Tribunal render an award dismissing the Respondent's objections to jurisdiction in their entirety as having no merit.

Dated: May 23, 2012

Respectfully submitted,

[Handwritten signature of Mark A. Johnson]

¹⁷³ Orakhelashvili, p. 293 (C-113).

174 *Id.*

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